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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-829

FIRST JERSEY SECURITIES, INC., a Corporation of the State of New Jersey; ROBERT E. BRENNAN; JOSEPH GALLIGAN; JACK MONDEL; CHARLES OEHLERT; JOHN DELL; MICHAEL ZUDONYI; and ANTHONY NADINO,

Petitioners,

vs.

HONORABLE VINCENT P. BIUNNO, Judge, United States District Court
Respondent
(GEORGE J. BERGEN, individually and in his official capacity; and NATIONAL ASSOCIATION OF SECURITIES DEALERS, a Corporation of the State of Delaware,
Real Parties in Interest)

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.

FIRST JERSEY SECURITIES, INC., a Corporation of the State of New Jersey; ROBERT E. BRENNAN; JOSEPH GALLIGAN; JACK MONDEL; CHARLES OEHLERT; JOHN DELL; MICHAEL ZUDONYI; and ANTHONY NADINO,

Petitioners,

vs.

GEORGE J. BERGEN, individually and in his official capacity; and NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., a Corporation of the State of Delaware,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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The petitioners, First Jersey Securities, Inc., Robert E. Brennan, Joseph Galligan, Jack Mondel, Charles Oehlert, John Dell, Michael Zudonyi, and Anthony Nadino, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 29, 1979.

OPINION BELOW

The opinion of the Court of Appeals, not yet officially reported, appears at Appendix E hereto, p. 36a *et seq.*, and at 1979 CCH Federal Securities Law Reporter, ¶97, 106, p. 96, 135. The opinion of the United States District Court for the District of New Jersey, not reported, appears at Appendix C, p. 5a *et seq.*

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on August 29, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is a federal suit claiming violations of Due Process by a quasi-federal agency in a pending disciplinary proceeding subject to immediate dismissal for failure to exhaust administrative remedies, even though a substantial and uncontested showing of constitutional abuses by the agency is made?

2. Can a court of appeals issue a writ of mandamus to reverse a district court's decision to retain its acknowledged jurisdiction over a challenge to an administrative proceeding because the court of appeals views as erroneous the district court's manner of applying the discretionary doctrine of exhaustion of administrative remedies to the facts of the case?

3. Can a federal licensee who has made a verified *prima facie* showing of abuses and bias in a pending administrative disciplinary proceeding be denied the right to

discovery in a federal district court on its claims, particularly where no right of discovery exists at the administrative level or in the court of appeals on review?

4. Is it contrary to the exclusive federal district court jurisdiction provided by 15 U.S.C. §78aa to dismiss a challenge to a proceeding pending before the National Association of Securities Dealers where a verified *prima facie* showing has been made demonstrating violations of the Securities Exchange Act by the National Association of Securities Dealers in connection with the pending proceeding?

5. Is the Maloney Act, 15 U.S.C. §78o-3, unconstitutional because it allows a private panel of securities dealers to judge the conduct of their competitors and to effectively prevent their competitors from engaging in the securities business?

6. Does the 1975 amendment to the Securities Exchange Act, which removed the right to *de novo* fact-finding in the SEC on review of a NASD disciplinary action, result in an unconstitutional delegation of federal administrative powers to a private association of industry competitors?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 15, §78o-3

United States Code, Title 15, §78s

United States Code, Title 15, §78y

United States Code, Title 15, §78aa

Pertinent sections of these statutes are set forth at length in Appendix I hereto at p. 66a *et seq.*

STATEMENT UNDER RULE 33(2)(b)

Since this proceeding draws into question the constitutionality of the Act of June 6, 1934, as added June 25, 1938, 52 Stat. 1070, and as amended by the Act of June 4, 1975, 89 Stat. 127, 15 U.S.C. §78o-3, and of the Act of June 6, 1934, 48 Stat. 898, as amended by the Act of June 4, 1975, 89 Stat. 146, 15 U.S.C. §78s, Acts of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. §2403(a) may be applicable.

No court of the United States as defined by 28 U.S.C. §451 has, pursuant to 28 U.S.C. §2403(a), certified to the Attorney General the fact that the constitutionality of such Acts of Congress have been drawn into question.

STATEMENT OF THE CASE

This proceeding was initiated by the petitioners (sometimes collectively referred to herein as "First Jersey") in the United States District Court for the District of New Jersey on April 17, 1979, by a verified complaint seeking damages and an order enjoining a disciplinary proceeding brought against them by respondent National Association of Securities Dealers, Inc. ("NASD"). The jurisdiction of the district court was invoked under 28 U.S.C. §1331 (general federal question jurisdiction), and under Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa (granting exclusive jurisdiction to the district courts over violations of the Securities Exchange Act and the rules and regulations thereunder).

Petitioner First Jersey Securities, Inc. is a broker and dealer in securities registered with the Securities and Exchange Commission ("SEC"), and is a member of the

NASD. The other petitioners are all officers or employees of First Jersey, and are also registered with the SEC and are members of the NASD. Respondent NASD is the only national securities association registered under the Maloney Act, 15 U.S.C. §78o-3, and is the only "self-regulatory" agency in the "over-the-counter" securities industry. Respondent George J. Bergen is the vice-president of the NASD and is the District Director of NASD District 12, which governs New York City and the surrounding area.

First Jersey's verified complaint alleged that the NASD and Bergen were violating First Jersey's federal and state constitutional rights to Due Process, including the right to a fair hearing before an impartial tribunal and to effective assistance of counsel, as well as its rights to a fair procedure under the Maloney Act and under the federal Administrative Procedure Act, 5 U.S.C. §554. First Jersey's action stemmed from an NASD investigative proceeding which had resulted in the filing of an administrative complaint against petitioners by the District 12 Business Conduct Committee of the NASD. At the time the district court complaint was filed, the NASD proceeding was in the prehearing stage. It remains at that stage today. The NASD complaint charged that First Jersey had violated NASD rules, and can result in the expulsion of First Jersey from membership in the NASD. Expulsion from the NASD effectively means disqualification from engaging in the securities business.[1]

In the verified complaint in the district court, First Jersey alleged facts concerning the manner and means by which the NASD District 12 investigation was pursued

1. See §25 of the NASD Rules of Fair Practice; interpretation of Board of Governors, ¶2301, NASD Manual.

and the procedure by which the administrative complaint was filed. The facts were verified by petitioner Brennan, First Jersey's president, and supported by affidavits of First Jersey's attorney and of third parties who had been threatened with reprisals by NASD employees if they did not cooperate in building a case against petitioners. These facts were developed later through sworn deposition testimony, most of it from NASD employees. That discovery, initially resisted by the NASD, began on April 26 but was ordered terminated by the Court of Appeals on May 21 (see order at pp. 3a-4a, Appendix B hereto). It revealed numerous other statutory and constitutional abuses in the NASD proceeding previously unknown to First Jersey.

The verified complaint and supporting affidavits alleged *inter alia*:

(1) that the members of the NASD panel which was to hear the administrative complaint had been hand-picked by the chief investigator, Bergen, in violation of NASD rules;

(2) that Bergen had made *ex parte* statements to the hearing panel members and others indicating a personal bias against First Jersey and petitioner Brennan, and exerted an undue influence over the panel members;

(3) that NASD investigators had threatened prospective witnesses with reprisals if they did not provide evidence against First Jersey;

(4) that First Jersey had been denied a reasonable opportunity to defend the complaint and had been denied effective assistance of counsel;

(5) that the competitor-dominated NASD could not provide a fair tribunal;

(6) that the District 12 tribunal had combined investigative, prosecutorial and adjudicative functions in an impermissible manner; and

(7) that the NASD was operating under an unconstitutional delegation of governmental powers.

The interrupted and abbreviated discovery revealed *inter alia* the following additional facts:

(1) that an unprecedented secret prosecutor's report, containing conclusions that petitioners had committed fraud and NASD rule violations, had been circulated to the District 12 committee members who were to hear the charges in the complaint;

(2) that two of the three hearing-panel members chosen by Bergen had the same employer as several of the prospective NASD witnesses against First Jersey;

(3) that NASD investigators had leaked information concerning the confidential NASD complaint to the press, resulting in prejudicial articles in the national press;

(4) that the NASD had conducted secret *ex parte* post-complaint depositions of prospective witnesses;

(5) that the NASD investigation was deliberately one-sided and focused only on witnesses presumed to be unfavorable to First Jersey; and

(6) that evidence discovered which was favorable to First Jersey was withheld from it.

The facts alleged and discovered by First Jersey were never controverted by either respondent, nor were they contested at a three-day plenary hearing in the district court, where respondents rested without calling any witnesses. These facts were found by the district court,

who heard testimony and examined the discovery record, to raise a "serious" and "substantial challenge" to the NASD proceeding, which that court described as "more like trial by combat than hearing by fair procedure" (slip opinion, pp. 23a, 24a, 25a, Appendix C hereto).

The plenary hearing took place under an expedited schedule ordered by the Court of Appeals (order of May 15, at p. 1a). The district court had before it the NASD's motion to dismiss the complaint and First Jersey's application for a preliminary injunction. In a reasoned opinion covering forty pages of transcript, the district court on June 4 concluded that First Jersey had made a showing sufficient to warrant retention of jurisdiction and not invocation of the doctrine of exhaustion of administrative remedies at that time (slip opinion, p. 29a). The court also indicated that, "[e]xcept for recent developments", it had been inclined "on the interrupted record to seriously consider the grant of a preliminary injunction as proper, at least for a limited period" (p. 23a).[2] Under the circumstances, however, it also denied the application for an injunction without prejudice. (The district court's order denying both motions is included at p. 34a, Appendix D hereto.)[3]

2. The recent developments referred to were: (1) the filing two weeks earlier of an SEC administrative complaint against several of the petitioners containing allegations similar to some of those in the NASD complaint (p. 25a); and (2) the NASD announcement at the plenary hearing of a decision to transfer the pending proceeding to NASD District 8 in Chicago (p. 26a). The district court assumed that a hearing on the SEC complaint would precede any NASD action in District 8, and that steps could and would be taken to insulate the District 8 panel from many of the deficiencies existing in the District 12 proceeding (pp. 26a-29a). On that basis, the district court found "no reasonable likelihood of immediate and irreparable harm" warranting issuance of injunctive relief (p. 29a).

3. The district court also denied after oral argument a motion by respondents to certify an interlocutory appeal under 28 U.S.C. §1292(b) (Transcript of June 7, 1979; Order of June 12, 1979).

Two petitions for mandamus filed by respondents were pending before the Court of Appeals while the district court was hearing and considering the parties' motions. Substantial briefs on the petitions had already been filed by order of the Court of Appeals before the district court's June 4 decision. On August 29 the Court of Appeals granted one of NASD's petitions, and ordered the district court to dismiss the case for lack of jurisdiction (Judgments, p. 61a; Writ of Mandamus, p. 63a).

The appellate court's ruling was based on the district court's decision not to apply the exhaustion of administrative remedies doctrine. *The Court of Appeals did not consider the discovery record or the facts adduced at the district court hearing.* It held that there should have been no discovery, and that the district court was without jurisdiction, despite the applicability of 28 U.S.C. §1331 and 15 U.S.C. §78aa, because the verified complaint did not allege a sufficiently "clear and unambiguous" constitutional violation, nor any irreparable injury (slip opinion, pp. 42a-43a, 46a). The Court distinguished this Court's decision in *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978), reasoning that it did not bar mandamus because a district court's discretion in deciding whether the exhaustion doctrine supports a deferral to pending administrative proceedings is more "limited" than that involved in *Calvert Fire Insurance Co., i.e.*, in deciding whether the crowded state of the district court docket can support a deferral to pending state judicial proceedings (pp. 56a-57a).[4]

4. One reason advanced by the Court of Appeals to support its writ here, however, was the writ's "practical benefits . . . to improve judicial administration," in light of "the competing demands on the district court's time and its heavy calendar . . . [in the] 'era of excessively crowded lower court dockets'" (p. 58a).

Two of First Jersey's constitutional challenges, that of the NASD tribunal's inherent partiality due to its members' pecuniary interest as First Jersey's competitors, and that of improper delegation of governmental powers to the NASD, were addressed briefly and rejected by the Court of Appeals without reference to any supporting facts of record, statutes, rules or case law (pp. 48a-52a).[5]

There as yet has been no hearing on the NASD complaint against petitioners. No hearing date is presently scheduled. The NASD has indicated, however, that it will schedule a hearing, and that certain of the assumptions of the district court underlying its denial of an injunction (NASD deferral to the parallel SEC proceedings and insulation of the District 8 panel from the District 12 abuses), may be "inconsistent with NASD's assumptions".[6] Even assuming that all the district court assumptions precluding an injunction were fulfilled, the controversy regarding the jurisdiction of the district court and the inherent defects in the NASD's disciplinary procedures would remain.

5. The Court of Appeals opinion states that the issue of the NASD panel members' pecuniary interest as competitors of First Jersey was not raised by petitioners until after oral argument in that Court (p. 49a). In fact, the issue was raised in the verified complaint (First Count, ¶8) and was argued extensively in briefs submitted to the district court.

6. See NASD counsel's letter to the district court dated June 12, 1979 and responding letter of First Jersey's counsel dated June 20, 1979; and see NASD attorney Kilkenny's letter of September 4, 1979.

REASONS FOR GRANTING THE WRIT

1

The Issuance Of A Writ Of Mandamus To Correct A Perceived Abuse Of Discretion By The District Court Conflicts With Controlling Decisions Of This Court, Will Have Serious Impact On Future Discretionary Decisions, And Will Improperly Expand The Availability And Scope Of Appellate Review.

This Court in its recent decision in *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978), clearly held that the issuance of a writ of mandamus to correct a perceived abuse of discretion in a district court interlocutory order is improper. The Court of Appeals issued just such a writ in this case. All that was before the Court of Appeals was the district court's denial of the NASD's motion to dismiss, and the district court's refusal to grant an injunction, neither an appealable final order. The district court's decision to retain jurisdiction, at least temporarily, over First Jersey's complaint was based on a careful exercise of its discretion in determining whether to apply the doctrine of exhaustion of administrative remedies. That such a decision is discretionary is well-established by decisions of this Court. *See, e.g., N.L.R.B. v. Shipbuilding Local 22*, 391 U.S. 418, 426n8 (1968); *Natural Gas Pipeline Co. v. Slattery*, 302 U.S. 300, 311 (1937).

Although this Court spoke categorically in the *Calvert Fire Insurance Co.* case on this issue, the Court of Appeals thought that *Calvert* only "may have limited the availability of mandamus" to correct abuses of discretion by a lower court (slip opinion at p. 56a). It seemed to see some continued support in *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957) for corrective use of the writ in

discretionary contexts, despite this Court's later decision in *Will v. United States*, 389 U.S. 90 (1967) *(id.)*. In that case, the Court noted that *LaBuy* was "simply inapposite where there is no showing of a persistent disregard of the federal rules." 389 U.S. at 104n14. No such disregard was present in this case. The Court of Appeals here was apparently misled, just as was the court of appeals in *Will v. United States*, by the "semantic fallacy" that the district court was without "jurisdiction" because in its view a proper exercise of discretion under the exhaustion doctrine should have resulted in dismissal. 389 U.S. at 98-99 and at 98n6; *Will v. Calvert Fire Insurance Co.*, 437 U.S. at 665n7; and compare the Court of Appeals opinion below at pp. 38a, 42a, 54a-55a, 56a, 57a.

The Court of Appeals also insisted, despite the holding of *Will v. Calvert Fire Insurance Co.*, 437 U.S. at 665-666, that the "right to mandamus can be clear and indisputable" where the district court decision challenged is one within its "limited discretion" and is "closely restricted by well-defined legal principles." (slip opinion, p. 57a). No other court of appeals has presumed to so restrictively read the *Calvert Fire Insurance Co.* decision. See, *e.g. United States v. Watson*, 603 F.2d 192, 195-197 (C.C.P.A. 1979); *In re United States*, 598 F.2d 233, 236-238 (D.C. Cir. 1979); *Union Light Heat & Power Co. v. U.S. District Court*, 588 F.2d 543, 544 (6th Cir. 1978), *cert. dismissed*, — U.S. — (1979). The unwarranted modification here of the Court's ruling in the *Calvert Fire Insurance Co.* case seriously undercuts its effect, and undermines the statutory bar on interlocutory appeals. It represents a significant and improper expansion of appellate jurisdiction to immediately review any district court decision having any element of discretion, which prospect itself may well inhibit thoughtful exercise of the district court's

equitable jurisdiction in the future, and encourage safe district court rulings mechanically applying the perceived "well-defined legal principles".

Nor can the decision of the Court of Appeals be justified even under its own rationale, since the doctrine of exhaustion of administrative remedies hardly leaves a "limited" range of discretion to the district court, nor are the legal principles involved so "well-defined." See, *e.g.*, 3 Davis, *Administrative Law* (1958), Chapter 20, p. 56 *et seq.*; *American Airlines v. Forman*, 204 F.2d 230 (3d Cir.), *cert. denied*, 346 U.S. 806 (1953). Here the district court's exercise of discretion was careful and considered, and should not have been "second-guessed" by the Court of Appeals. See, *e.g., National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 642 (1976); *In re Cleland*, 218 U.S. 120, 122 (1910).

These conflicts with applicable decisions of this Court, and the serious effect they will have, justify the grant of certiorari to review the judgment below.

2

The Dismissal On Mandamus Of Petitioners' Uncontroverted Claims Of Substantial Constitutional And Statutory Defects In The NASD Proceeding Effectively Closes The Federal Courts To Any Such Challenges To Federal Agency Action, A Result Which Should Be Clearly Condemned By This Court.

The Court of Appeals inconsistently ruled that while a federal challenge to a pending unconstitutional *state* administrative proceeding is not barred by the doctrine of exhaustion of remedies, the same challenge to a similarly unconstitutional *federal* agency proceeding, such as here, is barred under the exhaustion doctrine. Such an

anomalous result, though clearly of substantial importance, has yet to be directly rejected by this Court. *This case presents a clear-cut opportunity for this Court to decide this issue and its collateral questions in a proper factual context.*

One aspect of this issue is the present unavailability of a judicial exception to the exhaustion doctrine in a federal agency context which would parallel the jurisdiction exception to the exhaustion doctrine existing under 42 U.S.C. §1983 in a state agency context. See, *e.g., Gibson v. Berryhill,* 411 U.S. 564, 574 (1973); Court of Appeals slip opinion at p. 52a, note 5. Some older decisions of this Court suggest the propriety of such a federal agency exception to exhaustion of administrative remedies. See, *e.g., Public Utilities Comm. v. United States,* 355 U.S. 534, 539-540 (1958); *Aircraft & Diesel Equipment Corp. v. Hirsch,* 331 U.S. 752, 773n38 (1947); *Steele v. Louisville & Nashville R.R. Co.,* 323 U.S. 192, 206-207 (1944). The courts of appeals of the various circuits which have considered aspects of the question are not in accord. Contrast the instant case and *Sanders v. McCrady,* 537 F.2d 1199, 1200-1201 (4th Cir. 1976), with *Fitzgerald v. Hampton,* 467 F.2d 755, 768-769 (D.C. Cir. 1972), and *Fay v. Douds,* 172 F.2d 720, 723 (2d Cir. 1949).

Another aspect of the exhaustion issue concerns the statutorily mandated exclusive jurisdiction in the district courts over violations of the Securities Exchange Act under 15 U.S.C. §78aa (Appendix I, p. 78a). The NASD has a statutory duty under the Maloney Act, 15 U.S.C. §78o-3 (Appendix I, p. 66a), to provide a "fair procedure for the discipline of [its] members". Failure to do so gives rise to an action for an injunction or damages cognizable *only* in the federal district court. 15 U.S.C. §78aa. Such failure was alleged, supported and uncontroverted in this case.

Nevertheless, the Court of Appeals, without citation, "reject[ed] the notion that [15 U.S.C. §78aa] conclusively established jurisdiction in this case" (slip opinion at p. 42a) because of the applicability of the exhaustion doctrine. The Court of Appeals noted the availability of "judicial review" from final agency action (p. 43a, 52a), which is lodged exclusively in the *court of appeals* under 15 U.S.C. §78y(a) (Appendix I, p. 75a). In this respect, the Court of Appeals decision is in conflict with this Court's decision in *Leedom v. Kyne,* 358 U.S. 184 (1958), and improperly thwarts exercise of the district court's exclusive original jurisdiction to redress violations of the Securities Exchange Act under 15 U.S.C. §78aa. *Merrill Lynch, etc. v. Nat. Ass'n of Securities Dealers,* 343 F. Supp. 591 (N.D. Tex. 1977), *app. pending.*

Moreover, the action of the Court of Appeals has practical implications which seriously compound the legal and jurisdictional error involved, because it forecloses all opportunity for a victim of unconstitutional or statutory abuses by a federal agency to obtain any discovery into those abuses. An NASD member facing a disciplinary hearing has no right to discovery at either the NASD or the SEC-review level, nor in the Court of Appeals after a final ruling. That right is only available in the district court. But the Court of Appeals has ruled that the district court must not allow any discovery, and must immediately dismiss any challenge to a pending federal agency proceeding unless the plaintiff can demonstrate a "clear and unambiguous constitutional violation" (54a-55a, 56a), which the Court of Appeals itself acknowledges can require "extensive discovery and evidentiary hearings" to establish (53a-54a). The "catch-22" nature of such a ruling insulates all but the most obvious known administrative abuses from scrutiny, and closes the district courts and the benefits of the discovery rules to those who need them most, the vic-

tims of agency abuse who have less than overwhelming proof at the time the complaint is filed.

Ironically, the Court of Appeals ignored the fact that First Jersey's allegations were initially supported by affidavits, and later by deposition testimony of NASD employees, that they were never controverted or even contested at the district court hearing, and that they included constitutional violations which had already occurred.[7] It ignored the extensive factual review in the district court opinion. It ignored the fact that the SEC, the reviewing agency here, was itself conducting proceedings against several of the petitioners. Under these circumstances, where First Jersey's substantial claims were ordered dismissed, it is difficult to conceive of *any* federal agency abuse case which a district court in the Third Circuit would entertain in the future.

The serious adverse effect of the Court of Appeals' ruling, and the importance of protecting proper access to the federal courts and its processes, justify the grant of certiorari to review the judgment below.

3

There Are Serious Constitutional Infirmities In The NASD Disciplinary Process Which This Court Has Never Addressed, And Which Are Especially Important In The Unique Context Of Self-Regulation In The Securities Industry.

Apart from the numerous areas of actual bias and specific constitutional and statutory violations by the NASD which were adduced below, First Jersey also alleged inherent constitutional defects in the disciplinary aspect of

7. The Court of Appeals opinion contains the startling statement that no constitutional violation "occurs" until a "specific deprivation of liberty or property" occurs, which in turn "would only occur if and when sanctions are imposed by the NASD and upheld through all levels of review" (slip opinion, p. 54a).

the unique NASD "self regulatory" system. For the most part, they were never reached or relied on by the district court, but were addressed and rejected by the Court of Appeals. These constitutional defects have resulted in petitioners' livelihood being placed initially in the hands of their business competitors, not a federal agency, who could very well be the sole fact-finder in the disciplinary process.

This Court has recently considered similar cases involving competitor-professional self-regulation in state agency contexts. *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Wall v. American Optometric Association*, 379 F. Supp. 175 (N.D. Ga.), *summarily aff'd sub nom. Wall v. Hardwick*, 419 U.S. 888 (1974). In those cases, the Court held that the adjudicatory aspect of competitor regulation violated the right to a fair and impartial tribunal due to the possibility of bias deriving from the competitor judge's indirect financial stake in the outcome of disciplinary proceedings. *Friedman v. Rogers*, 440 U.S. 1, 18 (1979). While the Court has not considered whether NASD disciplinary procedures specifically are suspect, it has noted that the Securities Exchange Act "affords no justification for anti-competitive collective action taken without fair procedures." *Silver v. New York Stock Exchange*, 373 U.S. 341, 364 (1963). In both *Gibson* and *Wall*, this Court agreed with the district court assessments as to the improper pecuniary interests inherent in the competitor-panels involved. Here there was no opportunity for district court findings on this issue; there was only a ruling on it in the abstract by the Court of Appeals.

Interrelated with the competitor-regulation defect in the NASD proceeding, and aggravating it, is the impact of the 1975 amendment to the Securities Exchange Act, which removed the right of an NASD member to *de novo*

fact-finding on SEC review of an adverse NASD ruling. Compare the former 15 U.S.C. §78o-3, with the present 15 U.S.C. §78s(e)(1) (Appendix I, p. 71a). The effect of that amendment is the unconstitutional delegation of power by Congress from the government agency charged with the ultimate regulatory responsibility, the SEC, to a private industry association of interested competitors. A similar delegation was condemned in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). The amendment also has the ancillary result of causing the improper by-pass of the Administrative Procedure Act safeguard requiring an independent, impartial hearing examiner for federal agencies (5 U.S.C. §556, §1305), since it effectively transforms the NASD into the SEC's hearing examiner in a whole class of disciplinary cases. See, *e.g.*, *U.S. Health Club, Inc. v. Major*, 292 F.2d 665, 667 (3d Cir.), *cert. denied*, 368 U.S. 896 (1961); *Borg-Johnson Electronics, Inc. v. Christenberry*, 169 F. Supp. 746, 754 (S.D.N.Y. 1959).

Further, the record in this case, as detailed in part in the opinion of the district court, revealed that the inherent pecuniary interest of the NASD panel was aggravated by the combination within it of investigative, prosecutorial and adjudicative functions under circumstances not faced by the Court in *Withrow v. Larkin*, 421 U.S. 35 (1975), but similar to those condemned by the courts in *Amos Treat & Co. v. S.E.C.*, 113 U.S. App. D.C. 100, 306 F.2d 260 (1972) and other cases. *Withrow*, 421 U.S. at 50n16. Such combination of inconsistent functions here is of critical significance, since the SEC has stated that "a rigid separation between investigative and adjudicative personnel . . . is an essential element of fairness in NASD proceedings at the district business conduct committee level." *In re Cotzin*, CCH Federal Securities Law Reporter, 1973-1974 Transfer Binder, ¶79,827, p. 84,232 at p. 84,236.

The importance of a thoughtful consideration of these constitutional issues here is underscored by the fact that the NASD is the sole private association involved in the "self-regulation" or "cooperative regulation" experiment in the over-the-counter securities market. See Loss, *Securities Regulation*, Ch. 8C, p. 1359 *et seq.* and p. 3448 *et seq.* The Court of Appeals for the Third Circuit has itself observed that the NASD self-regulatory mechanism "is a departure from the traditional governmental exercise of enforcement power in the first instance," making "meticulous compliance" by the NASD with high standards of procedural fairness of prime concern. *Todd & Co. v. Securities & Exchange Comm.*, 557 F.2d 1008, 1041 (3d Cir. 1977). The SEC has noted also that "[u]nless district business conduct committees maintain high standards of justice and fair play, the whole NASD program may fall into disrepute." *Sherman Gleason*, 15 SEC 639, 648-649 (1944). See Lowenfels, *A Lack of Fair Procedures in the Administrative Process: Disciplinary Proceedings at the Stock Exchanges and the NASD*, 64 Cornell L. Rev. 375 (1978).

These serious constitutional issues and their impact on the NASD-SEC regulatory process justify the grant of certiorari in this case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

/s/ Donald A. Robinson
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/s/ Ronald J. Riccio
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DATED: November 26, 1979.

Supreme Court, U.S.
FILED
NOV 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-829

FIRST JERSEY SECURITIES, INC., a Corporation of the State of New Jersey; ROBERT E. BRENNAN; JOSEPH GALLIGAN; JACK MONDEL; CHARLES OEHLERT; JOHN DELL; MICHAEL ZUDONYI; and ANTHONY NADINO,

Petitioners,

vs.

HONORABLE VINCENT P. BIUNNO, Judge, United States District Court
Respondent
(GEORGE J. BERGEN, individually and in his official capacity; and NATIONAL ASSOCIATION OF SECURITIES DEALERS, a Corporation of the State of Delaware,
Real Parties in Interest)

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-1572

FIRST JERSEY SECURITIES, INC., a corporation of the State of New Jersey; ROBERT E. BRENNAN; JOSEPH GALLIGAN; JACK MONDEL; CHARLES OEHLERT; JOHN DELL; MICHAEL ZUDONYI; and ANTHONY MADINO,

Respondents,

vs.

GEORGE J. BERGEN, individually and in his official capacity; and NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., a corporation of the State of Delaware,

Petitioners,

and

HONORABLE VINCENT P. BIUNNO, Judge, United States District Court,

Nominal Respondent.

PRESENT: SEITZ, *Chief Judge,* WEIS and GARTH, *Circuit Judges.*

ORDER

Upon consideration of Petitioners' motion in the above-entitled case,

It is ORDERED,

Petitioners' motion to take jurisdiction and dismiss the complaint is denied without prejudice to the consideration of such issue in disposing of the petition for a writ of mandamus or prohibition.

Petitioners' motion for a stay of all proceedings below is denied without prejudice on the premise that a preliminary injunction hearing will take place before the district court on June 5 and will be decided very promptly thereafter. If the court's premise proves unfounded, a further application may be made to the court.

Petitioners' motion to seal the record in this matter will be granted subject to a further order of this court.

BY THE COURT,

/s/ Seitz
Chief Judge

DATED: May 15, 1979

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-1572

FIRST JERSEY SECURITIES, INC., a corporation of the State of New Jersey; ROBERT E. BRENNAN; JOSEPH GALLIGAN; JACK MONDEL; CHARLES OEHLERT; JOHN DELL; MICHAEL ZUDONYI; and ANTHONY MADINO,

Respondents,

vs.

GEORGE J. BERGEN, individually and in his official capacity; and NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., a corporation of the State of Delaware,

Petitioners,

and

HONORABLE VINCENT P. BIUNNO, Judge, United States District Court,

Nominal Respondent.

Present: SEITZ, Chief Judge, WEIS and GARTH, Circuit Judges.

ORDER

1. Petitioners' further application for a stay of all proceedings, pursuant to this Court's order of May 15, 1979, in which it requests a stay of the proceedings

below and/or vacating Nominal Respondent's orders of April 17 and 30, 1979 requiring petitioners to provide immediate discovery, pending ruling on a motion by petitioners to dismiss the Complaint, *with* attachments.

2. Copy of this Court's orders dated May 15, 1979, forwarded by the undersigned for the Court's information

in the above-entitled case.

Respectfully,

/s/ T.F. Quinn
T.F. QUINN
Clerk

enc.
kg

"The foregoing further application for a stay of all proceedings is granted to the extent that there shall be no further discovery pending further order of this Court."

BY THE COURT,

/s/ Seitz
Chief Judge

DATED: May 21, 1979.

APPENDIX C

FIRST JERSEY SECURITIES, INC., et al.,
Plaintiffs,

vs.

GEORGE J. BERGEN, individually and in his official capacity; and NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., a corporation of the State of Delaware,
Defendants.

TRANSCRIPT OF PROCEEDINGS DATED JUNE 4, 1979 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, BEFORE THE HONORABLE VINCENT P. BIUNNO, U.S.D.J.

(Filed June 5, 1979)

Appearances:

ROBINSON, WAYNE & GREENBERG, ESQS.,

BY: DONALD A. ROBINSON, ESQ. and RONALD J. RICCIO, ESQ.

For the Plaintiffs.

SHANLEY & FISHER, ESQS.,

BY: MATTHEW PARLEY, ESQ.,

For the Defendant National Association of Securities Dealers, Inc.

HELIRING, LINDEMAN, GOLDSTEIN & SIEGAL, ESQS.,

BY: RICHARD K. COPLON, ESQ.,

For the Defendant George J. Bergen.

(610) THE COURT: The first thing I want to do is to return the exhibits. I have here the plaintiff's exhibits, —not to counsel, I'm going to return them to the Clerk, Court Exhibits, DB exhibits, DN exhibits.

To counsel I'll return the deposition exhibits, this package being First Jersey's, the other package, I guess, being NASD.

(Documents handed to counsel.)

THE COURT: Now, on Saturday, or was it Friday—well, anyway, sometime since we last met, there was delivered to me by NASD attorney a letter,—well, it's dated June 1, I guess that's when it was delivered—with a telephoto facsimile, duplicate, of an NASD certificate as to corporate resolution. The case was not discussed in any way.

When the Clerk comes back, I will ask that be marked DN-8. Any objection?

This is what I received. Have you got copies?

MR. ROBINSON: Yes, sir.

(Exhibit marked DN-8 for identification.)

THE COURT: Now, as I explained to counsel on Friday, I did not see any likelihood of being able to produce a written opinion. I'm ready to deliver it orally from the bench.

This suit seeks, among other things, judicial intervention into a quasi-administrative disciplinary (611) proceeding initiated before the District Business Conduct Committee for District 12, which I will hereafter abbreviate as DBCC-12, of the National Association of Securities Dealers, which will be abbreviated NASD, against plaintiffs by means of

a complaint alleging failure to abide by various NASD rules of conduct, the complaint being designated as NY-1977.

Very briefly, NASD is a private and presumably non-profit Delaware Corporation, established for the purpose of functioning as a quote, "National Securities Association," unquote, registered with the SEC pursuant to the Maloney Act, Public Law 33-467, 15 USC Section 78o-3, as added June 25, 1938, to the Securities Exchange Act of 1934, which itself appears as 15 USC Section 78a et seq. The Court understands it to be the only such private body so organized and registered in that category.

The general purpose of the Maloney Act, as a reading of it discloses, is to provide a Federal blessing or sanction to the formation and operation of associations of securities brokers and dealers for the purpose of self-policing of the conduct of members from the standpoint of professional and business ethics, and especially to the extent that those standards of ethics advance the interests of the general public which transacts business with the members.

(612) At least for the scope of the permitted or required activities, partial exemption from the antitrust laws is implied.

The pattern is essentially like that established by the National Industrial Recovery Act as applied to various industrial categories and which was found unconstitutional. The Maloney Act is a few years later and its eventual upholding may reflect in part a withdrawal by the Supreme Court from the intergovernmental branch confrontation highlighted by the court-packing plan in the Roosevelt era.

In any event, the basic structure is not much different than that of the medieval guilds for countless trades or of the professions of medicine and law.

For most of the history of medicine it was the professional medical society that decided who was qualified to practice. It is only a matter of relatively recent vintage for licensing to be required through a governmental agency. Even so, professional medical societies still possess a significant voice in many aspects, although the trend is to diminish it. See Falcone v. Middlesex, 34 N.J. 582, 1961.

In England, so far as this Court understands, it has been the function of the Inns of Court, which are professional societies, to pass on the admission and (613) discipline of barristers for more than 900 years, and they still do.

Here, the trend for law has been toward governmental control. Before the present court system was established in New Jersey on September 15, 1948, lawyers were admitted to practice by commission of the Governor out of the executive branch. Bar associations, formed as voluntary associations or as non-profit corporations, had their own committees on matters of ethics and grievances, although at most they could only expel a member without any effect on his right to practice law.

Under the present system, the authority to deal with admission to the practice of law and the discipline of persons admitted is vested in the new Supreme Court by New Jersey Constitution 1947, Article VI, Section 2, Paragraph 3. As the New Jersey court rules disclose, the ethics committees are no longer committees of bar associations functioning with the blessing of the court, but are committees of the court itself, appointed by it and serving as its hands.

In this sense NASD, while no doubt reflecting a vast advance from zero at the time it was formed, seems to have stood still while modern notions in other fields have

passed it by. The Maloney Act does require that one or more directors of the corporation are to be representative of issuers of securities or of investors, who are not associated (614) with any securities broker or dealer. This is found in 15 U.S.C. Section 78o-3(b)(4). But this requirement does not seem to reflect in the structure of the DBCC's, at least insofar as District 12 is concerned.

All committee members are evidently connected with a broker-dealer but one, and that one is connected with an insurance company which, from the record, sells variable annuities, which are "securities," but this is hardly representative of "issuers" whose securities, whether debt or equity, are handled by broker-dealers, or representative of the investing public. Compare the current New Jersey court rules, which require a minimum segment of each district ethics committee to be non-lawyers.

Thus, NASD is a sort of a hybrid, falling somewhere between the entirely private organization and the traditional administrative agency of government. It is probably akin to the status of the non-profit voluntary hospital, other than a purely private or governmental hospital, which serves the public generally as a quasi-public institution. Its obligation to serve the public has been said to be the linchpin of its public trust and fiduciary relationship with the duty among others of attempting to elevate standards of medical care. See Garrow v. Elizabeth General Hospital, — N.J. — slip opinion of May 15, 1979, opinion of Mr. Justice Schreiber at page 8.

(615) In that case the hospital was ruled to be obliged to allow a medical staff applicant to appear at a board hearing with counsel and to provide prehearing disclosure of the documents and information on which a preliminary rejection of the application was grounded, these being what seem to be newly formulated requirements.

A reading of the Maloney Act discloses that the major, if not only, purpose of NASD is to advance the public interest through its regulation of members. Unlike the trustee of a non-profit hospital, NASD does not have the multiple functions of providing securities services to the public and incidentally of maintaining and elevating ethical standards. It is, in effect, a collateral branch of all the member firms in the securities industry to which there has been assigned in common the special function of establishing, maintaining and elevating standards of business conduct in the public interest.

Mutual funds, pension funds and trusts, trust departments of banks and other institutional investors, some of whom may also be issuers, and sometimes broker-dealers, hardly need NASD for their protection. The same is probably true of the well-heeled, sophisticated investor.

The major function of NASD appears to be intended to serve the general public, the ordinary individual (616) investor, who does not know the difference between a put and a call, nor what a sale against the box is, and the like, and who probably cannot interpret intelligently or accurately any prospectus fully complying with SEC requirements.

(617) So far as the record goes, NASD is the only association of brokers and dealers organized to serve the functions contemplated by the Maloney Act. It is nationwide, with operations divided among the thirteen districts on a geographical basis. See NASD Manual, November, 1978, CCH paragraph 1401 A.

In this structure it has a higher duty to the entire general public than does the board of a single hospital, and for the same reason is subject to a different measure of performance in meeting the standard requiring it to "pro-

vide a fair procedure" for the disciplining of members under the Maloney Act, 15 USC Section 78o-3(b)(8), and to avoid imposing any burden on competition not necessary or appropriate to further any of the purposes of the Securities Exchange Act of 1934, 15 USC Section 78o-3(b)(9).

A broker-dealer not admitted to, or if admitted expelled from, NASD has nowhere else to go. This is quite unlike the doctor and the hospital. The difference is one of degree, but it is of an entirely different magnitude.

At the present stage of the case, which involves an application for preliminary injunction to restrain a hearing before NASD set for June 5, 1979, as well as motions for dismissal or stay and several collateral matters, it is not necessary to decide precisely what the nature and status of NASD is. It is certainly not entirely private. It is (618) nationwide, and evidently is the only game in town.

Its disciplinary determinations at the district level go to the Board of Governors of NASD and then to a government agency, SEC itself, from which judicial challenge is had in the Court of Appeals. Without the blessing of the Maloney Act, NASD could well be open to charges of violating the antitrust laws.

For present purposes, it is enough to say that NASD is a sui generis unique hybrid, private in form but quasi-public in nature, functioning independently of SEC, but subject to its review, supervision and approval. Its closest counterparts may be in units like the Joint Committee on Accreditation of Hospitals, a privately created unit whose determinations have influence in the application of laws and regulations, or the private organization which publishes the U.S. Pharmacopeia, and whose listing of monographs of articles constitute one of the definitions of a

"drug" under 21 United States Code as a consequence of which someone might be sent to jail.

It is also analogous, in some ways, to boards of arbitration, which are privately structured tribunals, arising out of private contract, designed to perform adjudicative functions as to both facts and law as economical and efficient substitutes for the cumbersome and expensive judicial process. Although once frowned on as invasions of the (619) judicial function, they are now not only allowed, but encouraged. This is mostly by decisional law, supplemented by general statutes on arbitration and policy encouragement as part of the collective bargaining process.

With this background it is possible to turn to the questions before the Court. The record shows that NASD District 12 undertook an examination of the corporate plaintiff over a period of time. The record suggests that SEC personnel also conducted examinations, with one unit stepping aside while the other was functioning. The fact of these examinations carries no implication in and of itself. Both bodies are structured to conduct examinations, as are all regulatory bodies, private or public, along, of course, with IRS.

The NASD examination culminated in a detailed 29 page report, deposition Exhibit P-18, summarizing the analysis, views and conclusions of its authors who were identified as the District Director and Examiner Donohue, see the May 4, 1979 transcript, page 72, lines four to 19, and there seems to have been no participation by any member of the District legal staff. See the same reference, page 72, line 20 to page 73, line 25.

This report, along with a draft complaint, NY-1977, was mailed to the members of the DBCC-12 about two weeks before the meeting of January 30th at which the (620)

Committee voted to issue the complaint. There were no changes in the draft and little, if any, discussion of either the report or the draft took place at the meeting. The District Director, who does not appear to be a Committee member of DBCC-12, moved the resolution and it was adopted by voice vote. See the same transcript, page 77, line 16 to page 79, line 18.

(621) There had been a lawyer serving as counsel for DBCC-12, deposition transcript page 4, lines 7 to 15. He left in about October, 1978, for another assignment elsewhere within NASD. There has not been any general counsel at DBCC-12 since then. The District Director, who is not a lawyer, undertook the de facto function of acting general counsel after that, evidently with some recent law graduates hired as attorneys-trainee and perhaps one staff attorney with several years since admission. See the same transcript of May 4, page 79, line 19, to page 98, line 4.

The staff attorney assigned to the case from about October, 1978, was admitted to the Bar January 31, 1979, the day after the meeting at which DBCC-12 voted to issue the complaint which itself was issued the day after his admission, February 1, 1979.

Under NASD structure, as described at the depositions, hearing on a complaint is assigned to a panel of three members of DBCC-12. The usual practice described is that the three members are selected not by the chairman of DBCC-12, but by the staff attorney assigned to present the case. In this instance that practice was not followed. The selection was made here by the District Director in consultation with the soon-to-be or recently-admitted staff attorney.

(622) The deposition record also discloses, as claimed by NASD, that witnesses to testify were not reviewed for

selection until after the panel of three had been picked. As it worked out, several of these were employees of the same broker-dealer firm with which one panel member was connected and eventually eight more were listed who were employees of the broker-dealer firm with which another panel member was connected.

In several instances conferences were had with potential witnesses for whom affidavits were prepared and signed with the intention of using them if it turned out that they were not available to appear at the hearing. In a larger number of cases witnesses were sent a "formal request" letter after the complaint was issued and served, to appear at NASD offices to testify. No notice was given to the adverse interests. The testimony was taken under oath by Q and A and transcribed. Much of the questioning in the transcripts available to the Court was leading. The other transcripts were not available presumably because of the discovery stay.

NASD concededly has no subpoena power. Hence the formal request letters were issued by reference to Article IV, Section 5, of the NASD Rules of Fair Practice, Manual, CCH Paragraph 2205. That section authorizes a (623) DBCC agent to require any person associated with an NASD member to report orally or in writing on any matter involved in a hearing. Under Article V, Section 1, Manual CCH Paragraph 2301, the consequences for neglect or refusal to comply ranges from censure, through a fine of up to $5,000, to suspension or revocation of registration. Although different in form, the formal request letters which were sent to persons subject to NASD rules were the functional equivalent of a subpoena ducas tecum. The Latin word "subpoena" means "under penalty."

As an aside, the Court observes that under the law applicable to criminal cases, once a charging indictment has

been returned, the process of a court may not be used to enforce a Grand Jury subpoena or a civil administrative subpoena when its purpose is to obtain evidence for the criminal case or to conduct a "pretrial conference" to that end.

On the civil side, the Court knows of no rule or principle which bars any party from interviewing a witness, or obtaining his statement or affidavit, or taking testimony under oath by Q and A with a transcript, either before or after suit was filed. This is true so long as the person is a witness other than a party and so long as he is willing (624) to do so without compulsion.

Persons who are adverse parties may not be approached by the lawyer for another for such a purpose, either before or after suit is filed. This is by reason of the constraints imposed in the public interest by the Code of Professional Responsibility. It is not ethical to do so because the adverse party is put at an unfair disadvantage.

(625) The rule as to non-party witnesses is different. There is nothing unethical about the practice ex parte, but only so long as the witness is willing. If he be unwilling, then it would be unethical to issue a subpoena, or any letter or paper giving the impression of a subpoena, before suit filed, except, of course, in a proceeding on notice to perpetuate testimony. After suit filed, then a subpoena may be issued to unwilling witnesses, but only on notice and by way of deposition or the like. Party witnesses may also be examined after suit filed, without subpoena, but only so long as the witness is willing. If he be unwilling, failure to provide discovery.

The present record is less complete than it might have been due at least in part to the order of the Court of Appeals to stay discovery at the request of NASD before

discovery was finished. This was in connection with a petition for mandamus and prohibition calendered to be heard sometime in July and about which the Court has little information beyond the tenor of the order for stay with which it has complied with care.

It is difficult to assess the impact of the ex parte affidavits and sworn transcripts gathered by NASD. The deposition record indicates that the intention was to offer them as evidence at the hearing in the event the witness (626) was not available to testify. It is said that hearsay is admissible, presumably without cross-examination. It is said the intention was to furnish these materials at a pre-hearing conference after answers were filed but not before. Plaintiffs here insist that they need these and other materials gathered in support of the complaint in order to be able to draft an answer to meet the allegations of the complaint.

The NASD position, as well as the practice described, seem to the Court on this incomplete record, and without deciding the point, to rest on unstable grounds. The witnesses concerned are all associated with an NASD member. Once they are labeled as such, namely as witnesses for a hearing, a "flag" is entered on both NASD and SEC records to prevent their escape from the jurisdiction of either. Hence, if Article IV Section 5 and Article V Section 1 have the effect claimed for the formal request letters, they can be used to require appearance at the hearing itself, and so the post-complaint pre-hearing practice used seems improper. The impropriety would be eliminated very easily by giving notice and an opportunity to cross-examine. This is an efficient tool used by the Courts, not as discovery, but to preserve testimony de bene esse, and there is no evident reason why an administrative (627) agency or NASD cannot make use of it.

In fact, for non-party witnesses, not subject to NASD rules and penalties, it may well be that a proceeding to perpetuate testimony, using the process of any State Court of general jurisdiction, or a Federal Court in a case like this, would be available. The practice and the remedy are very old and exist independently of the Rules of Civil Procedure. The key requirement, of course, is that notice be given with opportunity to cross-examine.

From this partial review of the facts presented, the question is whether this is a case where jurisdiction exists, and if it exists, whether it should be exercised to intervene at the start of what is essentially an administrative or arbitration process, on the ground that Constitutional rights and statutory rights, unrelated to the merits of the complaint, are likely to be infringed by the process itself.

It is essential that the question be distinguished from what Professor Davis calls the doctrine of primary jurisdiction. See Davis, Administrative Law, Chapter 19, hereafter "Davis." He observes, with considerable perception, that this doctrine deals with an entirely different subject than the principles of exhaustion and ripeness, both of which are concerned only with the timing of judicial consideration. As the Court understands the law, the doctrine (628) of primary jurisdiction in the context of this case means that NASD, not this Court, is to deal with the merits of the allegations in the NASD complaint and is to make the initial adjudication. It was in recognition of this doctrine that the Court cautioned the parties on many occasions that the case before it was not concerned with the merits of the allegations of the NASD complaint, or their adjudication, and that it would not allow its process to be used for that purpose.

Rather, the questions in respect to jurisdiction and dismissal involve the issues of exhaustion and of ripeness

which are well articulated and described by Davis in Chapters 20 and 21. (629) As Davis points out, the exhaustion rule, although said to be long settled, is by no means universally applied. There are many instances, in both state and federal courts, where exhaustion is not required. While no specific classification or definition seems to be possible, the best that can be said for a case like this one is that exhaustion will or will not be required according to the totality of the circumstances of the particular case.

This may be the linguistic equivalent of saying that the issue is decided on an ad hoc basis. Even so, it is oftentimes the only test, more and more relied on by the Supreme Court of the United States, so long as the circumstances taken into account are themselves as objective as possible and are stripped of subjective intent of the parties. The Court looks to nature and purpose rather than intent. This is essentially what Mr. Justice Holmes said long ago in one of his collected letters, when he observed that each case is felt to fall on one side or the other of a line which no one is able to draw no matter how skilled.

Of all the applicable decisions on the subject, the most informative and instructive appear to be the Gaer Brothers case, 144 Conn. 303, 1957, 65 A.L.R. 2d 749, which involves the applicable principles in the arbitration (630) context; the Merrill Lynch case, 434 F. Supp. 591, District of Texas, 1977, which involved an NASD disciplinary proceeding; Morgan v. U.S., 298 U.S. 468, 1936; the Ohio Bell case, 301 U.S. 292, especially at 304, 1935; the Somers case, 496 F. 2d 723 at 725, CA-3, 1974, cert. denied, 419 U.S. 832; the Agurs case, 427 U.S. 97, 1976; the Isbrandtsen case, 96 F. Supp. 383, District N.Y., 1951, affirmed 342 U.S. 950, 1952; In re Grand Jury Subpoenas, 573 F. 2d 936, CA-6, 1973; the Fairchild case, 451 F. Supp. 1189, Dist. N.Y., 1973; the Altemosa case, 524, F.2d 8, CA-3, 1975; the Writers case, 423 F. Supp. 1064, Dist. California, 1976; the Optometric case, 379 F. Supp. 175, Dist. Georgia, 1974, affirmed 419 U.S. 833, 1974; the Brady case, 373 U.S. 83, and its progeny, among others.

Also very much implicated are the prominent Myers case, 303 U.S. 41, 1938, and the equally prominent United Fuel Gas case, 317 U.S. 456, 1943, reflecting two instances which are on opposite sides of the undefined line. They are fully analyzed and discussed by Davis in Chapter 20.

What is especially pertinent about the United Fuel Gas case is the exposure and risk in respect to time, cost, expense and related consequences of what will evidently be a vigorously protested proceeding at the District level, the board level, the SEC level and the Court of Appeals level, not only on the substance or merits, but on the (631) collateral but vital issues of fair procedure.

If before the first step on that long and arduous road is taken it can be shown with sufficient persuasion that the procedure itself is so far open to serious question as to indicate a real doubt that the ultimate adjudication on the merits can be sustained in the face of the challenge, it would seem best for a court to intervene and consider whether it should prevent the taking of that first step.

As with a motion to suppress evidence obtained on an allegedly unlawful search and seizure, the question cannot be tested by the result of the search. The result may well show that the subject is in fact guilty of the charge grounded on the fruit of the search, but if the search be improper, the fruit must be suppressed.

It is useful for this purpose to review the nature of the challenges made to the NASD procedure which are not necessarily limited to constitutional aspects, but which also involve the broader command of the Maloney Act for a "fair procedure." (632) There are a number of

grounds on which the procedure before DBCC-12 hearing panel are challenged.

One is that the detailed report of the staff investigation in adversary style and ending with staff conclusions was distributed by District 12 staff to all members of the District 12 Committee as a basis for considering whether to authorize the issuance of the complaint of February 1, 1979.

The second is that under NASD practice, the three Committee members who compose the hearing panel were chosen by the District Director who supervised the investigation in consultation with the prosecutor designated to present evidence in support of the charges rather than by the Committee Chairman.

The third is that two of the three panel members chosen are connected with broker-dealer firms who are employers of a number of witnesses expected to be called to testify for the prosecution.

The fourth is that after the complaint was filed and served, NASD staff arranged to have a number of witnesses appear at NASD where their testimony under oath was taken without notice to the party charged and without opportunity for cross-examination. The major concern here seems to be that since NASD has no formal subpoena power, except for the coercive effect of a formal request, and since the proceedings are realtively informal in terms of Rules of Evidence, the (633) transcripts of this testimony may be received and considered even though the witnesses decline and cannot be compelled by the charged parties to attend the hearing for cross-examination. It also appears that counsel for a broker-dealer, that is the firm with which one of the panel members is connected, consulted with and provided the NASD staff attorney with

preceptor-like guidance with respect to the questioning of witnesses.

The fifth is that the District Director is in a position of considerable influence or domination and has exhibited personal bias and prejudice against the parties charged. There is evidence that he has been District Director of District 12 for more than two decades and is the only such Director who also holds office, namely as a Vice-President, of corporate NASD. His status as a full-time employee is contrasted with the transitory, part-time and uncompensated service of the members of DBCC-12. There is also evidence on the domination theme that when the General Counsel to DBCC-12 left, the District Director undertook his functions, including the direction of a young law graduate not yet admitted to the Bar. There is also evidence that he undertook supervision of a not yet completed examination or investigation when the supervisor in charge left for other employment. The stay of further discovery under the Court (634) of Appeals order precluded inquiry from other witnesses on this score.

The sixth is that although an NASD resolution requires proceedings of this kind to be conducted on a confidential basis, and compare NJ Court Rule R.1:20-5(d), information about the investigations and/or anticipated complaint is charged to have been leaked to several members of the press who wrote and published pre-hearing articles on the subject.

The seventh is that the witness-gathering stage of the investigation was conducted in a fashion designed to select only those witnesses whose accounts tended to support the prosecution theory without any serious effort to make a record of witnesses potentially in exculpatory of the charges. This item involves both the question whether the

investigators have an obligation to follow the facts, wherever they may lead, and an obligation to apply the principle of Brady v. Marland by informing the charged parties of potentially exculpatory information including matters going to credibility, of which they have knowledge, even though the prosecution does not intend to offer that evidence itself.

The eighth is that all members of the hearing panel are competitors to one degree or in one aspect or another of the corporate charged party.

The ninth is that all three members of the hearing panel were selected among other (635) protested criteria on the basis of their personal knowledge and experience in those branches of the securities business engaged in by the corporate charged party. The risk claimed here is that the panel members will take into account that kind of personal knowledge and experience, and that such information will neither be spread upon the record nor subjected to cross-examination.

There are other grounds, but these listed ones seem sufficient for the present discussion.

As has been already noted, discovery was interrupted by the stay, so the Court is confined to what was elicited before the entry of that stay.

The first obvious fact is that the challenged proceeding is not a routine disciplinary matter. This is not a hearing on a customer complaint that he was sold 200 shares when he only ordered 100 shares. This is not a complaint by a customer that the trade and settlement dates on a purchase of stock by him preceded the ex-dividend date, but that he did not get the dividend. (636) Matters like these are no doubt handled with great informality and with great confidence in the soundness of the adjudication.

The issues are simple, even if credibility be involved, and can be resolved with little effort and high confidence by a hearing panel sophisticated and informed in the law merchant of the securities industry.

Rather, this case is one in which, evidently, an underlying philosophy of the function of a broker-dealer in the over-the-counter securities aspect is at issue. The affidavit of the principal in the corporate charged party, while not considered at all on the merits of the allegations made, indicates a very sharp difference of opinion on this score. The functional theory advanced may be that of a genius or of a charlatan. That is an issue for NASD, not for this court. But it is an issue not likely to be resolved impartially and fairly on a brief, informal hearing.

The committees of NASD may have a wide array of complaints. If the experience with legal ethics committees is any index, the overwhelming mass are simple and easy to resolve, while a handful will be difficult, perplexing and time consuming. The concept of fair procedure implies that the difficult case will be handled with considerably more care and attention to procedural aspects than the simple (637) ones.

Except for recent developments to be mentioned, the inclination of the Court on the showing made on the interrupted record, was to seriously consider the grant of a preliminary injunction as proper, at least for a limited period. There seems to have been enough shown to indicate, without deciding, that the NASD procedures in this case are vulnerable to substantial challenge. To say this implies no view whatever in respect to the subjective motives of the District Director, his subordinant staff or the newly admitted lawyer assigned to the case. It may well be that their personal motives are the result of strong and experienced views that are sincerely held. It may

well be that their views are correct on the merits. Those are not the questions for the Court.

The questions here are measured by more objective tests. There was no need to distribute the long investigative report expressing unilateral views some two weeks before the January 30 meeting. The unchallenged statement that panel members are usually selected by the presenting attorney for the case, and here it was selected by the District Director who supervised the matter, rather than by the committee chairman, seems startling.

The sifting of witnesses and the selection of (638) some eight or ten who are employed by the same broker-dealer firms as two of the panel members makes the eyebrows rise. The formalistic and technical rejection of requests for referenced data underlying extensive summary schedules until after Answer filed sounds more like trial by combat than hearing by fair procedure.

If convinced that the case was beyond challenge on the merits, why hold back the underlying data which are the only support for summary schedules? The validity of such summaries always depends on their foundation. There was no reason to refuse to supply full size reproductions of the summary schedules when the difference in cost is negligible.

Why not give notice of the examination of witnesses on formal request after complaint filed and allow cross-examination? Evidently lacking an experienced general counsel, DBCC-12 staff made the common error of filing the complaint first and getting witnesses later, among others.

As mentional above, personal sincerity and high purpose motivation fail to address the challenge. No doubt those who used the rack, the iron maiden and the thumb screw

during the Spanish Inquisition were thoroughly sincere and motivated by what seemed to them to be high purposes as they saw those aspects subjectively.

(639) No doubt those conducting summary trials and executions in Iran today would say the same thing. These are extreme examples in the context of this case, but they are useful to remind us that both long ago and today personal sincerity and high motive or purpose have been relied on to justify such extremes. Those who ignore history are doomed to repeat it.

Such views and motives, however strongly held, will not meet or overcome a serious challenge on grounds of due process or fair procedure. These requirements must be given reality and meaning and not mere lip service.

(640) However, very recent developments make it unnecessary for the Court to make findings of fact and conclusions of law on these points.

The first of these is the fact now of record, that on May 17, 1979, the Security and Exchange Commission received from its staff a complaint naming the corporate charged party and some of the individuals named in the NASD complaint plus others, ordered a public hearing thereon for June 19, 1979, and referred the matter to the Chief Administrative Law Judge for assignment.

None of the factual grounds advanced to challenge the NASD complaint apply to the SEC complaint. That complaint is openly made by staff, not by SEC, and it is heard by an Administrative Law Judge, in whose selection neither staff nor SEC have any voice or part.

The Administrative Law Judge has subpoena power and its exercise is available to all parties. The Rules of Evidence have a formulation and are not essentially non-existent as with the NASD.

The Administrative Law Judge is independent of SEC and is competent to make his own rulings on evidence and procedure without looking to a District Director or an NASD staff attorney for the answer.

He is not a part-time uncompensated DBCC member asked to devote considerable time to an extended hearing at the expense of his normal occupation.

(641) The second development is that after the Court found, by serendipital research, provisions of Section 10 of the Code of Procedures for Handling Trade Practice Complaints, NASD Manual CCH, paragraph 3010, DBCC-12 requested and the NASD Board of Governors by its Executive Committee resolved, to transfer the NASD complaint to a district other than Districts 11, 12 or 13. Counsel for NASD informed the Court that the reassignment is expected to be made to District 8 headquartered in Chicago, see Exhibit DN-8.

While all the formal steps have not been taken, these two developments, taken together, indicate that there is no reasonable likelihood of immediate and irreperable harm. This view rests on a number of assumptions which should be articulated.

One: it is assumed that on a transfer to District 8, the NASD complaint will be handled by District 8 staff and not District 12 staff.

Two: it is assumed that the staff attorney assigned to the case in District 12 will disassociate himself from any active function at the District 8 proceeding. There has been a challenge in this case to the methods he allegedly employed in searching out witnesses. The facts in that regard are disputed. This implies that he may need to testify as a witness on those issues if they arise, and so would be forbidden by the Code of Professional (642) Responsibility from acting as an NASD attorney when presenting the case in District 8.

Three: it is assumed the panel selection at District 8 will be made by the Chairman of the DBCC-9 and not by legal or other staff. The Chairman may need to be informed of the broker-dealer associations of expected witnesses so that he may avoid any appearance of impropriety in selecting the panel. Any communications of this kind to the Chairman should, of course, be in writing and of record.

Four: it is assumed that the staff report, deposition Exhibit P-18, will not be seen nor its contents disclosed as such to any member of DBCC-8 including the panel members, although there is no reason why the entire DBCC-12 file should not be forwarded to DBCC-8 staff and no reason why DBCC-12 staff, present or former, may not brief the DBCC-8 staff and be available to testify on matters about which they have knowledge, so long as none of these matters reach any committee member of DBCC-8, except through hearings and the record thereof.

Five: it is assumed that DBCC-8 will be wholly unable to undertake the processing of NY-1977 until after the hearings of the SEC complaint is concluded. The very nature of DBCC's and their hearing panels, composed of part-time, unpaid individuals, makes this assumption obvious.

Six: while NASD hearing records evidently cannot (643) be used for SEC hearing purposes, this being the view expressed by the SEC legal staff and reported to the parties on the record in this case, there is evidently no reason why the SEC hearing record cannot be used for the later NASD hearings before DBCC-8. This principle of economy, especially in today's high expense atmosphere, is a worthy one for at least partial repeal of Parkinson's law. For a closely related example, see Colorado against U.S., 271 U.S. 153 at 167, 1925; Woodruff versus U.S., 40

F. Supp. 949, District Connecticut, 1951; U.S. versus R.J. Reynolds, 416 F. Supp. 316, District N.J., 1976. (644) Of particular interest is the discussion in the Woodruff case at page 954 of the provision of the Interstate Commerce Act authorizing the Commission to avail itself of the cooperation, services, records and facilities of state regulatory bodies as the basis for approval of the practice of making a single record for two bodies having related but separate functions. Similar provisions for SEC appear to exist in 15 U.S. Code Section 78a. Aside from making this assumption, the Court does not consider that it should look further into the matter of consolidation.

Seven: it is assumed that DBCC-8, after reviewing the files, may wish to consider amending the complaint. A comparison of complaint NY-1977 and the SEC staff complaint indicates that there are both common areas and differences. NY-1977 focuses on nine securities in a single six-month period, while the SEC complaint deals with three of those nine securities plus about four more, and embraces the same time span as well as other time spans, and also focuses on sections of the Securities Exchange Act itself and SEC rules and regulations thereunder, rather than on NASD rules.

These differences do not appear to be significant. Under the Maloney act, 15 U.S.C. Section (645) 78o-3(b)(7), NASD rules should provide for discipline for violation of any provision of the Securities Exchange Act and SEC rules and regulations thereunder which includes 15 U.S.C. Section 78j(b), which is Section 10(b) of the Act, and Rule 10(b)(5) thereunder. The essential substance involves what appear to be the same issues as the NASD rules. The differences, except for specific securities and time spans, seem to be technical rather than substantial.

Eight: it is assumed that DBCC-8 will set a new schedule, taking into account the demands of the impending

SEC hearing, for the filing of an answer which, in the complex circumstances here, may well be a general denial and any affirmative defenses as well as any objections to the complaint, and for prehearing conferences after the SEC hearing has ended to determine what issues remain to be tried as not covered by the SEC hearing transcript, and to provide such "fair procedure" discovery before hearing as the congressional command intends.

Consequently, in view of the recent developments and taking into account the assumptions made, which are intended to be illustrative rather than comprehensive, the Court is satisfied that there is not now, as of today, a risk of immediate and irreparable harm, such as to warrant a preliminary injunction in respect to the NASD (646) NY-1977 complaint. That application is, accordingly, denied. The denial is without prejudice to any further application as may be justified in the event that the stated and implied assumptions may be frustrated.

The motions of defendants to dismiss for want of jurisdiction or otherwise is also denied without prejudice. This is that kind of case where the basis for taking jurisdiction or exercising it turns on fact as well as law. Discovery was not only incomplete, but was interrupted at defendants' instance. The Court had an opportunity to hear and observe only a few witnesses. Other crucial witnesses, such as the DBCC-12 District Director and the three panel members, were not examined on deposition, much less in the Court's presence.

If the Court's assumptions prove to be correct, there may well be a point where it will be appropriate to stay this action or even to dismiss it. On an incomplete and still developing record, this Court lacks the necessary confidence to make any firm ruling today on this score.

The motion for sanctions is still open and cannot be acted upon at this time. For administrative purposes it will be ordered stayed subject to revival on due notice under the rules.

The applications for rulings on objections to (647) questions put to two witnesses, which they were directed not to answer, are necessarily stayed because these matters involve discovery and the Court of Appeals has ordered discovery stayed. For administrative purposes, those applications will be noted as withdrawn without prejudice with leave to renew on notice in due course after conclusion of the proceedings in the Court of Appeals.

(648) Finally, it should be said that in this ruling the Court has been careful to avoid any mention of the nine securities which are the subject of NY-1977 complaint. By resolution of the NASD Board of Governors, the NASD proceedings including the papers there filed, are confidential, and that status should be respected. Those papers are under seal here and in the Court of Appeals.

Nothing in the NY-1977 complaint is in any way related to the private enterprises whose securities, whether they be stocks or bonds, are mentioned, or their financial condition, future hopes or expectations. There is nothing to derogate or depreciate these securities per se. Those enterprises, as issuers, and those who hold investments in them, are not parties here nor are they represented here in any way.

Those external interests are real interests and they are entitled to be protected against collateral or incidental injury for no act or conduct of theirs. To do so would be unfair to them.

It must not be forgotten that no human knows or can know the future. When Thomas Watson pushed doorbells in Orange, New Jersey, peddling stock in his new company

at one dollar a share; the few who bought to help the aspiring young man are very wealthy today if they held that stock. The Maloid Company in Rochester was privately owned, and when the (649) owners decided to retire, another company with which they were associated in business declined an offer to buy it out. Outside interests bought Maloid and they and their investors have been very well rewarded. Countless other promising enterprises, however, have fallen by the wayside. No one yet knows how to identify one or the other at any stage. REIT's and partnership interests in cattle furnish similar familiar examples.

These are risk taking and investment questions for the investor to decide, and those who bought and hold this or that stock or bond ought not to be exposed to the risk of depreciation of its market or its value due to publicity about litigation involving unrelated questions. The Court will not unfairly put the individual investor or the issuer to that risk, whether the investor's holding proves in the future to be a goldmine or a dud.

Because time has been inadequate to address with confidence the matter of opening the existing seal on the entire record, or on most of it, the sealing order will remain in force for the time being. Sealing orders are not usual and should be continued only so long as the circumstances which warrant the order continue to exist. The hearings of May 30th, 31st and June 1st were conducted publicly. The Court is of the view that most of the official file can also be made public.

(650) Not being privy to all the factors, however, the Court feels itself unable to make that selection by itself. Counsel in the case are looked to as officers of the Court to examine with care the list of docket entries and to provide the Court with their views on those documents which

they have sound reason to believe should remain sealed until the confidential NASD proceedings are completed. The interests of persons not party to this case should not be overlooked. All other papers would then be opened to the general public.

No sealing order now or hereafter entered is intended to preclude use by any party of anything in the sealed file for the purpose of processing the SEC hearings or the subsequent NASD proceedings. They are not to be used for any other purpose without leave of Court first obtained in writing and on notice so long as they are sealed.

I have a judgment embodying that ruling, gentlemen, and I will sign it now and hand out copies.

The Clerk will file the original.

That concludes today's proceedings, gentlemen.

MR. ROBINSON: Thank you, your Honor.

MR. COPLON: Thank you very much, your Honor.

THE COURT: I'm sure you will want to meet and confer and discuss. There is a great deal there. If I can be of any assistance, don't hesitate to call upon me.

(651) MR. FARLEY: May I make an application to the Court?

THE COURT: Yes.

MR. FARLEY: In view of the assumptions in your Honor's ruling, may NASD recover its files from Peat, Marwick?

THE COURT: Well, I think you better first check with whoever is going to handle the proceedings for District 8, in light of what my assumptions were. I expect that an order will be needed to do that. It is now in their custody.

At the moment I don't know that it has even been assigned to District 8.

As soon as you know, take it up with counsel. Everybody has an index, do they not?

MR. ROBINSON: Yes, sir.

THE COURT: And I've made some assumptions as to who should see those documents when they get out to whatever district they go to which, not as a matter of direction by the Court in any sense, but I think common prudence, in light of what we have seen, suggests that's a wise course or possibly even a better one. I don't intend to confine the new district in any way at all, but, yes, you may have an order, but I don't know what it's tenor should be.

When you find out, take it up with counsel and I'll be glad to sign it.

MR. FARLEY: We'll do that, your Honor.

(652) (Off the record discussion.)

(Adjourned off the record.)

APPENDIX D

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

CIV. 79-1093

FIRST JERSEY SECURITIES, INC., et als.,

Plaintiffs,

vs.

GEORGE J. BERGEN, et als.,

Defendants.

ORDER

For the reasons set forth on the transcript by way of oral ruling on this date, it is on this 4th day of June, 1979,

ORDERED that:

1. Plaintiffs' motions for preliminary injunction or for stay are denied without prejudice and with leave to renew on 3 business days' notice should need arise;

2. Plaintiffs' motion to order consolidation of proceedings before NASD on Complaint NY-1977 with SEC proceedings, is denied;

3. Defendants' motions to dismiss are denied without prejudice;

4. The motions of plaintiffs for Rule 37 sanctions is ordered stayed for administrative purposes, subject to revival on due notice under the rules;

5. The application of both parties for rulings on questions put to two witnesses on deposition, objected to and the witness ordered not to answer are discovery matters within the order for stay of the Court of Appeals. For administrative purposes they will be marked "Withdrawn without prejudice" with leave to renew on notice in due course after conclusion of the proceedings in the Court of Appeals.

6. The order sealing the record will remain in force, the same to be modified at the earliest feasible date after the receipt of submissions from the parties, taking due account of the interests of persons not parties or represented here.

/s/ Vincent P. Biunno,
VINCENT P. BIUNNO,
U.S.D.J.

Original to Clerk
xc: All parties

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 79-1572, 79-1789

FIRST JERSEY SECURITIES, INC.,
a corporation of the State of New Jersey;
ROBERT E. BRENNAN; JOSEPH GALLIGAN;
JACK MONDEL; CHARLES OEHLERT; JOHN DELL;
MICHAEL ZUDONYI; and ANTHONY NADINO,
Respondents,

vs.

GEORGE J. BERGEN, individually and in his official capacity; and NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., a corporation of the State of Delaware,
Petitioners,

and

HONORABLE VINCENT P. BIUNNO, Judge,
United States District Court,
Nominal Respondent.

PETITIONS FOR WRITS OF MANDAMUS

Argued July 12, 1979

Opinion Filed August 29, 1979

Before: ADAMS, ROSENN, and HIGGINBOTHAM, *Circuit Judges*

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OPINION OF THE COURT

ROSENN, *Circuit Judge*

We are presented with a petition for a writ of mandamus, urging us to direct the district court to dismiss a suit for want of subject matter jurisdiction.[1] The suit was filed in

1. An earlier petition for writ of mandamus (79-1572) requested that we prohibit the district court from granting the plain-

the United States District Court for the District of New Jersey, by First Jersey Securities, Inc., and some of its officers and personnel ("First Jersey"), seeking to enjoin the National Association of Securities Dealers, Inc., (NASD) and George J. Bergen, vice president of NASD and District Director for NASD District 12, from proceeding with a disciplinary hearing. The complaint also sought monetary relief. First Jersey requested a preliminary injunction while NASD moved for dismissal of the suit. The district judge denied both motions and retained jurisdiction over the suit. NASD then filed this petition. We stayed discovery in the action pending final disposition of the matter in this court. Because the district court is without jurisdiction to entertain this action which has resulted in unwarranted interference with the administrative process, we will grant the petition for a writ of mandamus and direct the district court to dismiss the case.

I. BACKGROUND

NASD is a securities association registered with the Securities and Exchange Commission pursuant to the provisions of the Maloney Act, 15 U.S.C. §78o-3 (1976). The purpose of the voluntary association is to provide self-regulation of the over-the-counter securities market. The Maloney Act authorizes the association to promulgate rules

> designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. . . .

15 U.S.C. §78o-3(b)(6) (1976); *see United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694, 700-01 n.6 (1975); *Todd & Co. v. SEC*, 557 F.2d 1008, 1012 (3d Cir. 1977). Furthermore, the statute gives the association the power to discipline its members who fail to conform to the standard of conduct established by the organization. 15 U.S.C. §78o-3(h) (1976). "The Act also authorizes the SEC to exercise a significant oversight function over the rules and activities of the registered associations." *United States v. National Association of Securities Dealers, Inc., supra* 422 U.S. at 700-01 n.6.

The NASD is headed by a Board of Governors. Its certificate of incorporation and by-laws divide the organization into thirteen geographical districts, each headed by a District Committee. The District Committee is required to appoint a District Business Conduct Committee, which assumes primary responsibility for enforcing the NASD rules. *See* II L. Loss, Securities Regulation 1365-69 (2d ed. 1961).

In November 1977, NASD staff examiners began investigating First Jersey Securities, Inc., a New Jersey corporation. First Jersey, a registered member of NASD, has fourteen offices located in four states and Puerto Rico employing approximately 350 people. NASD claims that its investigators uncovered "a pattern of market domination and price manipulation used to perpetrate a massive fraud on First Jersey's public customers." On February 1, 1979, the Business Conduct Committee of District 12 began a disciplinary proceeding by issuing a complaint against First Jersey, Robert E. Brennan (its president), six branch man-

tiff's motion for early discovery. That petition has been effectively superseded by the second (79-1789), requesting dismissal of the suit. Petitioners have also moved to have the court of appeals take jurisdiction of the case and dismiss the complaint on the grounds that jurisdiction rests exclusively with the United States Court of Appeals. We know of no basis for taking such action, and we deny the motion.

agers, and the supervisor of the trading department. As of yet, no hearing has been held by the NASD on this matter.

On April 17, 1979, First Jersey filed suit in the United States District Court for the District of New Jersey against NASD and George Bergen. The complaint sought damages, declaratory relief, and an injunction enjoining NASD from proceeding further with its disciplinary action against First Jersey. It alleged that Bergen had a long-standing bias against Brennan and that he influenced and corrupted the entire Business Conduct Committee to hold a similar bias, the effect of which was to deny First Jersey's constitutional rights to a fair hearing before an impartial tribunal. The complaint further alleged that the NASD had violated or would violate the Administrative Procedure Act, the Maloney Act, and various internal rules, resulting in a gross abuse of power; that the Maloney Act is an unconstitutional delegation of legislative power to the NASD; and that Bergen had maliciously and willfully caused a deprivation of First Jersey's constitutional rights and interfered with its contractual and business relations. First Jersey moved, and was granted, leave to take early depositions pursuant to Fed.R.Civ.P. 30(a). The district court refused a subsequent request by NASD for a stay of discovery.

First Jersey requested a preliminary injunction, and at the same time, NASD moved for dismissal of the suit. On June 4, 1978, the district judge delivered an oral opinion denying both motions without prejudice. During the pendency of these motions, two developments occurred. First, the SEC instituted its own independent proceeding by issuing a complaint against First Jersey. Second, NASD decided to transfer its proceedings to District 8 headquarters in Chicago in order to vitiate the accusations of bias.

The denial of the injunction was based on eight assumptions.[2] The district court assumed, among other things, that the District 12 staff would disassociate itself with the proceedings in District 8 and that District 8 would not proceed until after the SEC hearings were completed. The court retained jurisdiction over the matter "in the event that the stated and implied assumptions may be frustrated." NASD subsequently advised the district judge that it intended to use the District 12 staff attorney, who up to that point had not been involved in the First Jersey investigation, to present the case to the District 8 panel, and that the NASD proceeding would not necessarily await completion of the SEC hearings. NASD also moved for certification under 28 U.S.C. §1292(b) (1976) of the denial of the motion to dismiss. This request was denied, prompting NASD to file the petition for a writ of mandamus requesting that this court command the district court to dismiss the suit.

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2. The eight assumptions were:

1) The complaint will be handled by District 8 staff and not District 12 staff.

2) The staff attorney assigned to the case in District 12 will disassociate himself from any active function at the District 8 proceeding.

3) The panel selection will be made by the chairman of the District 8 Business Conduct Committee (DBCC-8).

4) The District 12 staff report will not be seen nor its contents disclosed to any member of DBCC-8.

5) DBCC-8 will be "wholly unable" to process the complaint until after the SEC hearing is concluded.

6) The SEC hearing record will be used for the NASD hearings before DBCC-8.

7) DBCC-8 "may wish to consider" amending the complaint.

8) DBCC-8 will set a new schedule for the NASD proceeding, taking into account the SEC hearing, among other things.

To succeed in obtaining a writ of mandamus, NASD must show that: 1) the district court lacks jurisdiction over First Jersey's suit, and 2) mandamus is the appropriate remedy in this case.

II. JURISDICTION IN THE DISTRICT COURT

First Jersey contends that jurisdiction in the district court can be based on 15 U.S.C. §78aa (1976) and 28 U.S.C. §1331 (1976). 15 U.S.C. §78aa provides in part: "The district courts . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder." The primary purpose of this provision is to provide exclusive federal jurisdiction for suits brought by the SEC or private parties in response to substantive violations of the chapter. Although under certain circumstances §78aa may confer jurisdiction on the district court to entertain suits against the NASD, *cf., Bright v. Philadelphia-Baltimore-Washington Stock Exchange*, 327 F. Supp. 495, 500 (E.D. Pa. 1971), we reject the notion that this provision conclusively establishes jurisdiction in the district court in this case.

The same can be said for 28 U.S.C. §1331. This statute grants jurisdiction to the district court for cases arising under the Constitution or laws of the United States, but it does not mean that jurisdiction is not precluded by another statute or doctrine of judicial administration.

NASD claims that the statutory review procedure establishes exclusive jurisdiction in the courts of appeals. Original jurisdiction over enforcing the NASD rules rests with the District Business Conduct Committee. The NASD Code of Procedure requires the District Business Conduct

Committee to hold a hearing replete with procedural safeguards to determine whether sanctions should be imposed against an alleged violator of the rules. The written decision of the Committee is reviewable by a subcommittee of the NASD Board of Governors, which is in turn reviewed by the entire Board. The Board's ruling can be appealed to the SEC for a *de novo* review. 15 U.S.C. §78s(d)(2) (1976). Finally, a "person aggrieved by a final order of the Commission . . . may obtain review of the order in the United States Court of Appeals" by filing a petition for review. 15 U.S.C. §78y(a)(1) (1976). The statute further provides: "On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part." 15 U.S.C. §78y(a)(3) (1976).

Thus, the statute, although establishing a comprehensive system of review, does not *explicitly* preclude an aggrieved party from seeking relief in a federal district court until the record is filed in the court of appeals. Yet the comprehensiveness of the review procedure suggests that the doctrine of exhaustion of remedies should be applied to prevent circumvention of the established procedures.

A. The Doctrine of Exhaustion of Remedies

In *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938), the Supreme Court stated that it is a "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." (Footnote omitted). The primary purpose of this well-established doctrine is "the avoidance of premature interruption of the administrative process," *McKart*

v. United States, 395 U.S. 185, 193 (1969), a concern which confronts us here. Furthermore, the principle allows the administrative agency to utilize its discretion and apply its expertise; it gives the agency the opportunity to correct its own errors; it minimizes piecemeal appeals of agency actions. *Parisi v. Davidson*, 405 U.S. 34, 37 (1972). "Finally, it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures." *McKart v. United States, supra* 395 U.S. at 195; *McGee v. United States*, 402 U.S. 479, 484 (1971); K. Davis, Administrative Law of the Seventies §§20.01-20.08 (1976).[3] Courts have frequently required dissatisfied litigants to exhaust their administrative remedies before the SEC as well as other agencies before coming into federal district court. In *Touche Ross & Co. v. SEC*, No. 78-6095 (2d Cir. May 10, 1979), an accounting firm attempted to enjoin an SEC proceeding commenced to determine whether the firm had engaged in unethical or illegal conduct. The district court dismissed the suit and the Second Circuit affirmed, holding that a claim of agency bias will not preclude application of the exhaustion doctrine.

3. Failure to exhaust administrative remedies may also raise constitutional problems:

> The general rule regarding the requirement of exhaustion of remedies is clear—when Congress has provided an administrative procedure which is capable of resolving a controversy such procedure must be utilized. It is only after the final administrative decision that the aggrieved parties may invoke the jurisdiction of the courts [citation omitted]. For the courts to act prematurely, prior to the final decision of the appropriate administrative agency, would raise a serious question regarding the doctrine of the separation of powers, and in any event would violate a congressional decision that the present controversy be initially considered by the [agency].

American Fed'n of Gov't Employees, Local 1904 v. Resor, 442 F.2d 993, 994 (3d Cir. 1971) (Adams, J.).

> We emphasize at the outset that normally we will not tolerate the interruption of the administrative process to hear piecemeal appeals of a litigant's claims on the merits. This is exactly what the exhaustion doctrine is designed to prevent. Accordingly, we wish to make it clear that Touche Ross must exhaust their administrative remedies by submitting to the Rule 2(e) proceedings before we will consider any challenges which they may assert with respect to any disciplinary action that the Commission may determine is appropriate under the circumstances.

Id. at 2568 (slip opinion).

Another case holding that judicial interference in an ongoing SEC proceeding was improper involved the allegation that one of the Commission members participating in the proceeding should have been disqualified. Although preceding the decision in *Touche Ross*, the court also held: "The administrative proceedings cannot be stopped to allow for excursions in the courts with prolonged evidentiary hearings; the time for that in a proper case is when an aggrieved litigant seeks judicial review of agency action having preserved the point of claimed disqualification in the administrative hearing." *SEC v. R.A. Holman & Co.*, 323 F.2d 284, 287 (D.C. Cir.), *cert. denied*, 375 U.S. 943 (1963). *See also R.A. Holman & Co. v. SEC*, 299 F.2d 127 (D.C. Cir. 1962), *cert. denied*, 370 U.S. 911 (1963).

We believe that the doctrine of exhaustion of administrative remedies applies with equal force to the disciplinary proceedings of the NASD. *See* II L. Loss, Securities Regulation 1376 n.73 (1961). The relevant statutes have established a comprehensive review procedure. The disciplinary proceeding begins with the District Business Con-

duct Committee and advances, if appealed, to the NASD Board of Governors, to the SEC, and finally to the United States Court of Appeals. This structure allows the agency to gather evidence, exercise its discretion, and apply its expertise at more than one level. It also gives the agency the opportunity to correct its own errors without resort to the courts and an opportunity for litigants to raise and preserve the issue of claimed bias. For administrative procedure to operate effectively, it is essential that courts refrain from interfering with the process unnecessarily. *See Nader v. Volpe*, 466 F.2d 261, 265-68 (D.C. Cir. 1972). Ultimate review by the court of appeals ensures that constitutional or statutory errors will not go unremedied.

B. The Exceptions

Even when the exhaustion doctrine would normally apply, extraordinary circumstances, nevertheless, may compel a court to hear a case. *See, e.g., McKart v. United States*, 395 U.S. 185, 192-201 (1969). "[W]here 'an immediate appeal is necessary to give realistic protection to the claimed right,' . . . a court may properly carve an exception to the doctrine. Only rarely, however, will 'preliminary [or] procedural . . . agency action' threaten so irreparable an injury as to justify interlocutory resort to corrective judicial process . . . ." *Bristol-Myers Co. v. FTC*, 469 F.2d 1116, 1118 (2d Cir. 1972). In this Circuit, we have recognized two situations in which the exhaustion requirement will not be adhered to: 1) when the administrative procedure is clearly shown to be inadequate to prevent irreparable injury; or 2) when there is a clear and unambiguous statutory or constitutional violation. *Barnes v. Chatterton*, 515 F.2d 916, 920 (3d Cir. 1975); *American Federation of Government Employees, Local 1904 v. Resor*, 442 F.2d 993, 994-95 (3d Cir. 1971).

1. Irreparable Injury

First Jersey alleges that irreparable harm will result from requiring exhaustion of administrative remedies because an adverse ruling by the NASD "would in all probability be terminal to First Jersey." Furthermore, such a ruling "would likely cause panic selling in securities in which First Jersey makes a market, thereby causing great harm to an unsuspecting public." The sole evidence presented by First Jersey in support of these allegations is the affidavit of Robert Brennan, president of the company.

In our view, these allegations are insufficient to bring this case within the narrow exception. First, NASD proceedings are kept confidential which should prevent damaging publicity to First Jersey or the specific securities involved. Second, if the NASD decides to impose sanctions, they would be subject to the statutorily prescribed review procedure, including review by the court of appeals. Finally, and most importantly, if this exception were to be applied in this case, it would likewise apply in every case where the NASD contemplated disciplinary proceedings. Any company threatened by an NASD hearing could run into district court claiming that the imposition of sanctions would result in irreparable injury. To allow such interruption would frustrate the self-regulatory scheme envisioned by Congress in passing the Maloney Act. Although we recognize the potential for harm that exists, we believe that the integrity of the administrative process requires us to reject this justification for intrusion.[4]

4. We rejected a similar claim in Barnes v. Chatterton, 515 F.2d 916, 921 (3d Cir. 1975):

> The requirement that Barnes exhaust his administrative remedies thus affects only the timing, not the effectiveness of judicial review. The delay, of course, is not without cost and we regret the additional pecuniary hardship and stress imposed upon Barnes. We are bound, however, by the holding of the Supreme Court that such costs do not constitute irreparable injury. Sampson v. Murray, 415 U.S. 61, 84-92 (1974).

2. Clear and Unambiguous Violation

Under the second exception, a mere allegation of a constitutional deprivation is insufficient to entitle the plaintiff to relief. *See Aircraft & Diesel Equipment Corp. v. Hirsch,* 331 U.S. 752, 771-72 (1947); *Montana Chapter of Association of Civilian Technicians, Inc. v. Young,* 514 F.2d 1165, 1167 (9th Cir. 1975); *Wallace v. Lynn,* 507 F.2d 1186 (D.C. Cir. 1974). The plaintiff must present a clear and unambiguous constitutional violation by the agency. *See Barnes v. Chatterton, supra,* 515 F.2d at 920. First Jersey makes several allegations of unconstitutionality, none of which are sufficient to excuse the failure to exhaust administrative remedies.

a. Unconstitutional Delegation

First Jersey claims that the Maloney Act is an unconstitutional delegation of legislative power to a private institution. In *Todd & Co. v. SEC,* 557 F.2d 1008 (3d Cir. 1977), we found no merit to this argument, because the SEC

> (1) has the power, according to reasonably fixed statutory standards, to approve or disapprove the Association's rules; (2) must make *de novo* findings aided by additional evidence if necessary, and (3) must make an independent decision on the violation and penalty . . . .

Id. at 1012, *see R. H. Johnson & Co. v. SEC,* 198 F.2d 690 (2d Cir.), *cert. denied,* 344 U.S. 855 (1952).

First Jersey points out, however, that the statute was amended in 1975 and the *Todd* court specifically refused to rule on the constitutionality of the amendment. *See* 557 F.2d at 1012 n.6. Prior to 1975, the review provision

of the statute called for the SEC to render its decision "upon consideration of the record before the association and such other evidence as it may deem relevant. . . ." 15 U.S.C. §78*o*-3(h)(1) (1970). The statute now provides that the SEC hearing "may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the sanction. . . ." 15 U.S.C. §78s(e)(1) (1976). We need not now decide whether this statutory change effects a significant alteration in the SEC's power to review NASD disciplinary proceedings. It suffices to say that to the extent the amendment restricts the SEC's ability to receive additional evidence not presented below, this does not alter our conclusion in *Todd* that there is no unconstitutional delegation of legislative authority.

b. Bias

The major thrust of First Jersey's contentions of unconstitutionality deal with the alleged bias of NASD and its inability to conduct a fair hearing before an impartial tribunal. This attack is carried at two levels: 1) because the Business Conduct Committee is composed of members of the industry, any panel of judges, as competitors of First Jersey, will have a personal pecuniary interest in seeing sanctions imposed against First Jersey; and 2) specific allegations portray Bergen's and the NASD staff's long-standing bias against Brennan and First Jersey.

(1.) Structural Bias

The first, which amounts to an allegation of structural bias and was expounded for the first time in a supplemental brief requested by the Court at oral argument, relies primarily on the Supreme Court decision in *Gibson v. Berryhill,* 411 U.S. 564 (1973). In *Gibson,* the Alabama

Board of Optometry intended to revoke the licenses which were required to practice of all optometrists employed by corporations, a group comprising about one-half of all the optometrists in the state. Members of the Board were drawn exclusively from the Alabama Optometric Association, whose membership was limited to independent practitioners. The district court found that the Board members, along with other private practitioners of optometry, would fall heir to the corporate practices if the licenses were revoked. The Supreme Court affirmed the district court's conclusion that this amounted to a deprivation of due process, holding that "those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes." *Id.* at 579. *See also Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Wall v. American Optometric Association*, 379 F. Supp. 175 (N.D. Ga.), *aff'd*, 419 U.S. 888 (1974).

Reliance on *Gibson* cannot provide First Jersey with a clear and unambiguous constitutional violation in this case. We believe that the NASD system of self-regulation is sufficiently dissimilar in crucial respects from the Alabama Board of Optometry's method of regulation to render the former constitutionally sound. NASD is a voluntary association, not a state agency. Unlike the Alabama Board of Optometry, NASD approval is not required to practice the trade. Neither NASD nor the industry it regulates is divided into factions or identifiable groups in a manner comparable to the independent practitioners versus the optometrists employed by corporations in *Gibson*. Neither First Jersey nor firms like it are excluded from membership in the association and, unlike the optometrists in Alabama, they were not denied participation in the governance of their own profession. In *Wall v. American Optometric Association*, 379 F. Supp. 175, 189 (N.D. Ga.), *aff'd*, 419 U.S. 888 (1974), the court pointed out that "[e]very member of the tribunal is a member of a group which opposes the continuation of the plaintiffs' businesses." That division is not present here.

Furthermore, the NASD hearing has been transferred to District 8, meaning that members of the panel will be drawn from the Chicago area. First Jersey does not have any offices in that area, but if it believed that one or more members of the panel were direct competitors with a personal interest in the outcome, it could file a motion to have those members disqualified through the administrative process. In addition, the basis for the disciplinary proceeding is not a status violation, similar to *Gibson* or *Wall*, which could lead to the demise of a substantial block of the industry; it stems instead from specific allegations of misconduct applicable only to First Jersey.

Finally, to uphold First Jersey's contention would destroy the valuable congressional scheme for self-regulation in the securities area and the destruction could very well extend to other areas employing intramural controls. The Maloney Act expresses Congress's thoughtful view that self-regulation is the best "first-line" defense against unethical or illegal securities practices. It allows the industry to set its own standards of proper conduct and permits their members to discipline themselves applying their own expertise and experience.

Although Congress preferred self-regulation by a private body over direct involvement of a governmental agency, it established safeguards to prevent abuse of the system. The Maloney Act requires specific procedural protections, some of which are drafted by the association. For example, the NASD Code of Procedure, unlike the proceedings before the Alabama Optometric Board in *Gibson*, requires the disqualification of any panel member who may have a personal interest in the outcome of the case. Further

insurance against abuse is provided by the supervisory role of the SEC. The SEC is required to approve of all the NASD rules and regulations, including those concerning discipline of NASD members. This oversight function also encompasses review of specific cases imposing sanctions. We believe that the intrinsic benefits of a system of self-regulation, insulated with extensive procedural and substantive protections and subject to judicial review, renders insignificant objections of bias to the system which inherently involves disciplining by potential competitors. We therefore reject First Jersey's contention that the NASD scheme for self-regulation is unconstitutional.

(2.) Specific Bias

The second prong of First Jersey's assault for bias against NASD deals with specific allegations of animosity on the part of Bergen and the NASD against First Jersey. The evidence of bias recited in First Jersey's complaint includes among other things the allegations that Bergen has said that he is out to "get Brennan," that he has called Brennan "slippery," that he has "personally devote[d] his full concentration and energies to First Jersey and Brennan," that NASD agents have referred to Brennan as a crook and have threatened uncooperative witnesses with reprisals. Regardless of the merit of First Jersey's claim, we hold that absent a showing of irreparable harm, allegations of personal bias are insufficient to excuse a plaintiff from the requirements of the exhaustion doctrine.[5]

5. Contrary to First Jersey's argument, Gibson v. Berryhill, 411 U.S. 564 (1973), does not stand for the proposition that an allegation of agency bias renders exhaustion of remedies inapplicable. The complaint in *Gibson* was based on 42 U.S.C. §1983, and "state administrative remedies need not be exhausted where the federal court plaintiff states an otherwise good cause of action under 42 U.S.C. §1983." *Id.* at 574, 575 n.14. NASD is not a state agency; therefore, First Jersey is unable to state a claim under section 1983.

In *Touche Ross & Co. v. SEC*, *supra*, the Second Circuit refused to allow an allegation of agency bias to excuse the failure to exhaust administrative remedies.

> If the claim of bias were the only basis for appellants' demand for injunctive relief, it would be unnecessary for us to go further than to hold, with respect to that claim, that exhaustion of administrative remedies is required. As the Court of Appeals for the District of Columbia Circuit has held, allegations of agency bias or prejudgment based on ex parte communications are insufficient for injunctive relief and cannot be reviewed until the agency has made an adverse determination and an appeal has been taken raising these claims on the record as a whole. *R. A. Holman & Co., v. SEC*, 299 F.2d 127, 129 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962); *National Lawyers Guild v. Brownell*, 225 F.2d 552, 555 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 927 (1956). We agree. Until the Commission has acted and actual bias has been demonstrated, the orderly administrative procedures of the agency should not be interrupted by judicial intervention.

Id. at 2568-69 (slip opinion); *see supra* at 7.

The principles underlying the exhaustion doctrine are particularly apt when applied to a claim of bias.[6] *See United States v. Litton Industries, Inc.*, 462 F.2d 14, 17-18 (9th Cir. 1972). First, an allegation of bias is usually controverted; resolution of the dispute requires extensive discovery and evidentiary hearings before the district court.

6. Where the evidence of bias is clear and uncontroverted and the claimed infirmity is fundamental, some courts have waived the exhaustion requirement. *See* Amos Treat & Co. v. SEC, 306 F.2d 260, 265 (D.C. Cir. 1962); Association of Nat'l Advertisers, Inc., v. FTC, 460 F. Supp. 996, 998-99 (D.D.C. 1978).

This results in substantial interference with the administrative process, which often, as in this case, cannot continue during the pendency of the suit. *See SEC v. R. A. Holman & Co., supra* 323 F.2d at 287. *See also Maremount Corp. v. FTC*, 431 F.2d 124, 128 (7th Cir. 1970). Furthermore, where the facts are in dispute, it is difficult for the plaintiff to assert a clear and unambiguous constitutional violation. *See Sterling Drug, Inc., v. FTC*, 450 F.2d 698, 710-11 (D.C. Cir. 1971).

Second, a claim of bias tendered during the course of an investigatory proceeding is unlikely to allege a constitutional violation that has already occurred. First Jersey claims that its due process rights have been infringed, but fails to point to any specific deprivation of liberty or property that has occurred at this time. Such a deprivation as a result of the alleged bias and investigative irregularities would only occur if and when sanctions are imposed by the NASD and upheld through all levels of review. *See National Lawyers Guild v. Brownell*, 225 F.2d 552, 555 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 927 (1956).

Finally, if exhaustion is required, the agency will often have the opportunity to correct or prevent an error as a result of bias. Most agencies provide for disqualification of members who may be biased. Other remedies may also be available. Here, for example, the transfer of the hearing to District 8 would appear to negate the effectiveness of Bergen's alleged ability to influence the result against First Jersey.[7]

We conclude therefore that First Jersey's failure to exhaust its administrative remedies rendered the district court without jurisdiction to entertain the suit. The proper response by the district court would have been to grant NASD's motion for dismissal. If and when sanctions are imposed on First Jersey, the company would have full and ample opportunity to present its due process and statutory claims to the court of appeals.

7. The various violations of the Maloney Act and the Administrative Procedure Act alleged by First Jersey also fall far short of the required standard of clear and unambiguous.

III. THE REMEDY

Having established that the district court lacks subject matter jurisdiction to entertain this suit, NASD faces the additional hurdle of showing that mandamus is the appropriate remedy. Section 1651(a) of 28 U.S.C. provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The writ of mandamus is a drastic remedy and its availability is closely circumscribed. "[T]he 'traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 661 (1978), *quoting from Roche v. Evaporated Milk Association*, 319 U.S. 21, 26 (1943). In order to obtain issuance of the writ, a petitioner must show that there are no other adequate means of relief and the right to the writ is clear and indisputable. *Kerr v. United States District Court*, 426 U.S. 394, 403 (1976); *United States v. Helstoski*, 576 F.2d 511, 516 (3d Cir. 1978), *aff'd*, 47 U.S.L.W. 4710 (U.S. June 18, 1979). The Supreme Court has expressed two reasons for the reluctance to rely on the mandamus remedy: the "unfortunate consequence" of making the district court judge a litigant and "the interest of the fair and prompt administration of justice to discourage piecemeal litigation." *Kerr v. United States District Court, supra* 426 U.S. at 403.

Courts have at times issued the writ to correct a clear abuse of discretion by the district court. *See LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957); *Texaco, Inc. v. Borala*, 383 F.2d 607 (3d Cir. 1967). The recent Supreme Court case of *Will v. Calvert Fire Insurance Co., supra*, however, may have limited the availability of mandamus under those circumstances. In that case, the court of appeals issued a writ to reverse the district court's decision to defer the federal court suit to concurrent state proceedings between the same parties. The Supreme Court reversed, holding that the requirements for the writ had not been met. Justice Rehnquist pointed out that the district court has wide latitude in setting its own calendar, which was, in effect, the issue in question. *Id.* at 655. He went on to say that "[w]here a matter is committed to the discretion of the district court, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Id.* at 665-66.

We believe, however, that the strict requirements for mandamus have been met in this case. NASD, in an effort to carry out its designated duty of enforcing the regulations of over-the-counter securities dealers, instituted a disciplinary proceeding against First Jersey. First Jersey attempted to block this effort by filing suit in district court. Because of the company's failure to exhaust administrative remedies, the district court was without jurisdiction and should have dismissed the suit. Instead the court allowed discovery to proceed, which burdened NASD sufficiently to effectively halt the action against First Jersey. The court, although denying First Jersey's request for preliminary relief, did so on the basis of certain assumptions. It retained jurisdiction over the suit and invited the company to return to court in the event any of the assumptions proved to be unfounded, which NASD states is the case as to some of the assumptions. This has the forceful effect of an injunction but precludes appellate review. Thus, NASD lacks an

alternative means of obtaining adequate relief. The district court's exercise of jurisdiction where none exists and foreclosing appellate review results in substantial interference with a congressionally mandated administrative process and amounts to a judicial usurpation of power.

We are unpersuaded by the argument that because the doctrine of exhaustion of remedies calls for some measure of discretion, *Will v. Calvert Fire Insurance Co., supra*, prohibits use of mandamus. Almost every judicial decision involves at least an element of latitude of choice within certain bounds. The degree of discretion varies with the differing legal bounds applicable to a decision. When the bounds circumscribing the relevant decision are few or broadly defined as in *Will v. Calvert Fire Insurance Co., supra*, (whether to defer to concurrent state proceeding between the same parties) or *Will v. United States*, 389 U.S. 90 (1967) (whether to order a party to file a bill of particulars), mandamus is an inappropriate remedy because the right to mandamus cannot be clear and indisputable. But where, as here, the decision is closely restricted by well-defined legal principles, the need for and the right to mandamus can be clear and indisputable.[8] We hold that when the district court impermissibly interferes with the legitimate operation of a federal administrative agency, the agency is entitled to the issuance of a writ of mandamus to halt the judicial usurpation of power.

8. The Ninth Circuit reached a similar conclusion concerning the limited discretion involved in applying the exhaustion doctrine:

> Although the cases sometimes refer to the development of judge-made exhaustion requirements as being within the courts' "discretion," the decision whether to require exhaustion is not discretionary in the sense that it can be made solely on the basis of the equities in any given case without regard to authoritative precedent. Rather, judicially-developed exhaustion requirements are "common law" rules in that the decisions of appellate courts on this issue will govern the subsequent decisions of the lower courts to which they properly apply.

Montgomery v. Rumsfield, 572 F.2d 250, 254 n.4 (9th Cir. 1978).

Moreover, the purposes of refraining from exercising our power to issue extraordinary writs would not be served by denying the writ in this case. The "unfortunate consequence" of making a judge a litigant is of only limited applicability in this circuit since we changed the mandamus procedure in *Rapp v. Van Dusen*, 350 F.2d 806 (3d Cir. 1965) (en banc). The district judge is now only named as a nominal respondent and is not required to file an answer to the petition. The prevailing party in the challenged decision is deemed to be the respondent and is required to defend the action in the court of appeals. Thus, the district judge is relieved of the burdens normally associated with a petition for mandamus.

In addition, the "interest of the fair and prompt administration of justice" is better served by ordering this case dismissed immediately, than by refusing to do so in order to discourage piecemeal appeals. This point is underscored by our concern for the competing demands on the district court's time and its heavy calendar and the recognition of the Supreme Court's concern with the "era of excessively crowded lower court dockets." *Kerr v. United States District Court, supra* 426 U.S. at 403. Allowing this case to proceed in the district court would be to ignore the practical benefits writs of mandamus can serve to improve judicial administration.

Finally, First Jersey contends that we are precluded from issuing a writ by the earlier case of *American Airlines v. Forman*, 204 F.2d 230 (3d Cir.), *cert. denied*, 346 U.S. 806 (1953). In that case, Slick Airways brought a "familiar type" of antitrust action against American Airlines. *Id.* at 231. American Airlines moved to dismiss the suit, arguing that the Civil Aeronautics Board had primary jurisdiction over the suit because it affected air travel. The district court denied the motion, and the airline petitioned for

mandamus. The court of appeals denied the petition and added that a challenge to a jurisdictional ruling was usually not enough to call for issuance of a writ:

> The challenged assumption or denial of jurisdiction must be so plainly wrong as to indicate failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine. If a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling, the case is not appropriate for mandamus or prohibition even though on normal appeal a reviewing court might find reversible error.

Id. at 232.

We believe that *American Airlines* is inapposite to the instant case for several reasons. The underlying dispute in *American Airlines* was a typical antitrust action between two private parties normally heard in federal district court. The district court carefully analyzed the relevant statutes and policy concerns and concluded that on the basis of the complaint there was no reason to refer the matter to the CAB. The alleged harm to American Airlines was having to defend an action in a forum usually reserved for antitrust suits rather than before the CAB. The only "interference" with the administrative agency was the refusal to direct the parties to take their dispute to the CAB. If the matter did belong before the CAB, then it could be sent there after a normal appeal, a remedy adequate to serve the interests of the agency.

Here, on the other hand, we have a private party asking a federal court to exert its power to direct an agency to halt the normal operation of its delegated regulatory duties mandated by federal law. Only in rare instances will a federal court consider issuing orders restraining the administrative process functions. Those circumstances are not

present in this case and the district court should have dismissed the suit. Its refusal to do so has resulted in substantial interference with the administrative process and has rendered the NASD unable to carry out its delegated responsibilities. The harm is too great to go unremedied.

In addition, the change in procedural operations in this circuit has undercut the rationale of *American Airlines*. Judge Hastie justified the extreme reluctance to issue a writ in part because "[p]rocedurally, these extraordinary remedies are actions against the judge himself, requiring him personally to justify and defend what he has done as a judge. . . . [I]n a very real sense the judicial officer himself is being put on trial." *American Airlines v. Forman, supra* 204 F.2d at 233. As discussed above, however, the procedure for obtaining writs in this circuit was changed in *Rapp v. Van Dusen, supra*. Although resort to this extraordinary remedy should still be approached with great caution, this particular concern has been considerably alleviated.

IV. CONCLUSION

The petition for writ of mandamus in 79-1789 will be granted directing the district court to dismiss First Jersey's suit against NASD. The petition in 79-1572 will be dismissed and the motion to have this court take jurisdiction and dismiss the case will be denied. Costs in 79-1789 will be taxed against the respondents, excluding the nominal respondent. Costs in 79-1572 will be taxed against the petitioner.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-1572

FIRST JERSEY SECURITIES, INC., a corporation of the State of New Jersey; ROBERT E. BRENNAN; JOSEPH GALLIGAN; JACK MONDEL; CHARLES OEHLERT; JOHN DELL; MICHAEL ZUDONYI; and ANTHONY NADINO,

Respondents,

vs.

GEORGE J. BERGEN, individually and in his official capacity; and NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., a corporation of the State of Delaware,

Petitioners,

and

HONORABLE VINCENT P. BIUNNO, Judge, United States District Court,

Nominal Respondent.

Present: ADAMS, ROSENN and HIGGINBOTHAM, *Circuit Judges*

It is ORDERED, ADJUDGED AND DECREED by this Court that the petition for writ of mandamus at No. 79-1572 be and the same is hereby dismissed and the motion to have this court take jurisdiction and dismiss the case be and the same is hereby denied, all in accordance with the opinion of this Court filed this day. Costs in No. 79-1572 are taxed against petitioners.

ATTEST:

/s/ Thomas F. Quinn
THOMAS F. QUINN
Clerk

Dated: August 29, 1979

ORDER

Upon consideration of the petition for Writ of Mandamus, of the Answer of Respondents, and the briefs in the above-entitled case,

It is ORDERED, ADJUDGED, and DECREED by this court that the prayer of the petition in the above-entitled case be and the same is hereby granted and the Clerk of this court is hereby directed to issue the Writ of Mandamus in accordance with the opinion of this court.

BY THE COURT:

/s/ Max Rosenn
Circuit Judge

Dated: August 29, 1979

APPENDIX G

WRIT OF MANDAMUS

UNITED STATES OF AMERICA,
THIRD JUDICIAL CIRCUIT SS.

To the Honorable Vincent P. Biunno, Judge of the District Court for the District of New Jersey,

GREETINGS:

Whereas the Honorable Vincent P. Biunno by order dated June 4, 1979 denied petitioners' motion to dismiss the suit below and retained jurisdiction thereof; and

Whereas George J. Bergen and National Association of Securities Dealers, Inc., Petitioners in the above-entitled case in this United States Court of Appeals for the Third Circuit, filed, on June 18, 1979, a petition for writ of mandamus to the Honorable Vincent P. Biunno, requesting this Court to direct the said Honorable Vincent P. Biunno to dismiss the suit below for want of jurisdiction; and

Whereas respondents named herein have filed answers in the consolidated cases, Nos. 79-1572 and 79-1789, June 1 and July 2, 1979; and

Whereas the petitioners and the respondents have filed supplemental briefs, on July 19, 1979; and

Whereas after due deliberation thereon this Court rendered its opinion and the same was filed this day, in which this Court found the district court without jurisdiction to entertain this action and directed that the prayer of this petition be granted; and

Whereas this Court, on this date has entered an order directing the Clerk of this Court to issue a writ of mandamus in accordance with the opinion of this Court filed herein;

Now Therefore The Honorable Vincent P. Biunno is Hereby Required and Directed, immediately after receipt of this writ, and without unreasonable delay, to dismiss respondents' suit against petitioners. Costs in the petition for writ of mandamus at No. 79-1789 are taxed against respondents, exclusive of the nominal respondent.

/s/ Thomas F. Quinn
THOMAS F. QUINN
Clerk of the United States
Court of Appeals for the
Third Circuit

Dated: August 29, 1979

APPENDIX H

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY
CIVIL No. 79-1093

FIRST JERSEY SECURITIES, INC., et als.,
Plaintiffs,

vs.

GEORGE J. BERGEN, et al.,
Defendants.

ORDER

It appearing to the court that under date of August 29, 1979, pursuant to order of the United States Court of Appeals for the Third Circuit entered on that same date, the Clerk of that court issued a writ of mandamus directing this court, immediately after receipt of said writ and without unreasonable delay, to dismiss plaintiffs' complaint herein; and

It appearing that a copy of said writ of mandamus was mailed by said clerk on August 29, 1979 and received by this court in chambers on September 4, 1979,

It is, on this 5th day of September, 1979, in compliance with said writ,

ORDERED that plaintiffs' complaint herein be and the same hereby is dismissed for lack of subject matter jurisdiction.

/s/ Vincent P. Biunno,
VINCENT P. BIUNNO
U.S.D.J.

APPENDIX I

15 U.S.C. §78o-3 (THE MALONEY ACT) (PORTIONS FROM VOLUME OF U.S.C.A., TITLE 15, §§78n TO 140, 1979 POCKET PART, PP. 80-84):

§78o–3. Registered securities associations–Registration; application

(a) An association of brokers and dealers may be registered as a national securities association pursuant to subsection (b) of this section, or as an affiliated securities association pursuant to subsection (d) of this section, under the terms and conditions hereinafter provided in this section and in accordance with the provisions of section 78s(a) of this title, by filing with the Commission an application for registration in such form as the Commission, by rule, may prescribe containing the rules of the association and such other information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Determinations by Commission requisite to registration of applicant as national securities association

(b) An association of brokers and dealers shall not be registered as a national securities association unless the Commission determines that–

(1) By reason of the number and geographical distribution of its members and the scope of their transactions, such association will be able to carry out the purposes of this section.

(2) Such association is so organized and has the capacity to be able to carry out the purposes of this chapter and to comply, and (subject to any rule or order of the Commission pursuant to section 78q(d) or 78s(g)(2)

of this title) to enforce compliance by its members and persons associated with its members, with the provisions of this chapter, the rules and regulations thereunder, the rules of the Municipal Securities Rulemaking Board, and the rules of the association.

(3) Subject to the provisions of subsection (g) of this section, the rules of the association provide that any registered broker or dealer may become a member of such association and any person may become associated with a member thereof.

(4) The rules of the association assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the association, broker, or dealer.

(5) The rules of the association provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the association operates or controls.

(6) The rules of the association are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, to fix minimum profits, to impose any schedule or fix rates

of commissions, allowances, discounts, or other fees to be charged by its members, or to regulate by virtue of any authority conferred by this chapter matters not related to the purposes of this chapter or the administration of the association.

(7) The rules of the association provide that (subject to any rule or order of the Commission pursuant to section 78q(d) or 78s(g)(2) of this title) its members and persons associated with its members shall be appropriately disciplined for violation of any provision of this chapter, the rules or regulations thereunder, the rules of the Municipal Securities Rulemaking Board, or the rules of the association, by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction.

(8) The rules of the association are in accordance with the provisions of subsection (h) of this section, and, in general, provide a fair procedure for the disciplining of members and persons associated with members, the denial of membership to any person seeking membership therein, the barring of any person from becoming associated with a member thereof, and the prohibition or limitation by the association of any person with respect to access to services offered by the association or a member thereof.

(9) The rules of the association do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter.

(10) The requirements of subsection (c) of this section, insofar as these may be applicable, are satisfied.

(11) The rules of the association include provisions governing the form and content of quotations relating

to securities sold otherwise than on a national securities exchange which may be distributed or published by any member or person associated with a member, and the persons to whom such quotations may be supplied. Such rules relating to quotations shall be designed to produce fair and informative quotations, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting, distributing, and publishing quotations.

* * *

Discipline of registered securities association members and persons associated with members; summary proceedings

(h)(1) In any proceeding by a registered securities association to determine whether a member or person associated with a member should be disciplined (other than a summary proceeding pursuant to paragraph (3) of this subsection) the association shall bring specific charges, notify such member or person of, and give him an opportunity to defend against, such charges, and keep a record. A determination by the association to impose a disciplinary sanction shall be supported by a statement setting forth—

(A) any act or practice in which such member or person associated with a member has been found to have engaged, or which such member or person has been found to have omitted;

(B) the specific provision of this chapter, the rules or regulations thereunder, the rules of the Municipal Securities Rulemaking Board, or the rules of the association which any such act or practice, or omission to act, is deemed to violate; and

(C) the sanction imposed and the reason therefor.

(2) In any proceeding by a registered securities association to determine whether a person shall be denied membership, barred from becoming associated with a member, or prohibited or limited with respect to access to services offered by the association or a member thereof (other than a summary proceeding pursuant to paragraph (3) of this subsection), the association shall notify such person of and give him an opportunity to be heard upon, the specific grounds for denial, bar, or prohibition or limitation under consideration and keep a record. A determination by the association to deny membership, bar a person from becoming associated with a member, or prohibit or limit a person with respect to access to services offered by the association or a member thereof shall be supported by a statement setting forth the specific grounds on which the denial, bar, or prohibition or limitation is based.

(3) A registered securities association may *summarily* (A) suspend a member or person associated with a member who has been and is expelled or suspended from any self-regulatory organization or barred or suspended from being associated with a member of any self-regulatory organization, (B) suspend a member who is in such financial or operating difficulty that the association determines and so notifies the Commission that the member cannot be permitted to continue to do business as a member with safety to investors, creditors, other members, or the association, or (C) limit or prohibit any person with respect to access to services offered by the association if subparagraph (A) or (B) of this paragraph is applicable to such person or, in the case of a person who is not a member, if the association determines that such person does not meet the qualification requirements or other prerequisites for such access and such person cannot be permitted to continue to have such access with safety to investors, creditors, members, or the association. Any person aggrieved by any such summary action shall be promptly afforded an opportunity for a hearing by the association in accordance with the provisions of paragraph (1) or (2) of this subsection. The Commission, by order, may stay any such summary action on its own motion or upon application by any person aggrieved thereby, if the Commission determines summarily or after notice and opportunity for hearing (which hearing may consist solely of the submission of affidavits or presentation of oral agruments) that such stay is consistent with the public interest and the protection of investors."

15 U.S.C. §78s (SECTION 19 OF THE SECURITIES EXCHANGE ACT OF 1934) (PORTIONS FROM VOLUME OF U.S.C.A., TABLE 15, §§78n to 140, 1979 POCKET PART, PP. 132-137):

"§78s. Registration, responsibilities, and oversight of self-regulatory organizations—Registration procedures; notice of filing; other regulatory agencies"

* * *

Notice of disciplinary action taken by self-regulatory organization against a member or participant; review of action by appropriate regulatory agency; procedure

(d)(1) If any self-regulatory organization imposes any final disciplinary sanction on any member thereof or participant therein, denies membership or participation to any applicant, or prohibits or limits any person in respect to access to services offered by such organization or member thereof or if any self-regulatory organization (other than

a registered clearing agency) imposes any final disciplinary sanction on any person associated with a member or bars any person from becoming associated with a member, the self-regulatory organization shall promptly file notice thereof with the appropriate regulatory agency for the self-regulatory organization and (if other than the appropriate regulatory agency for the self-regulatory organization) the appropriate regulatory agency for such member, participant, applicant, or other person. The notice shall be in such form and contain such information as the appropriate regulatory agency for the self-regulatory organization, by rule, may prescribe as necessary or appropriate in furtherance of the purposes of this chapter.

(2) Any action with respect to which a self-regulatory organization is required by paragraph (1) of this subsection to file notice shall be subject to review by the appropriate regulatory agency for such member, participant, applicant, or other person, on its own motion, or upon application by any person aggrieved thereby filed within thirty days after the date such notice was filed with such appropriate regulatory agency and received by such aggrieved person, or within such longer period as such appropriate regulatory agency may determine. Application to such appropriate regulatory agency for review, or the institution of review by such appropriate regulatory agency on its own motion, shall not operate as a stay of such action unless such appropriate regulatory agency otherwise orders, summarily or after notice and opportunity for hearing on the question of a stay (which hearing may consist solely of the submission of affidavits or presentation of oral arguments). Each appropriate regulatory agency shall establish for appropriate cases an expedited procedure for consideration and determination of the question of a stay.

Disposition of review; cancellation, reduction, or remission of sanction

(e)(1) In any proceeding to review a final disciplinary sanction imposed by a self-regulatory organization on a member thereof or participant therein or a person associated with such a member, after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the sanction)—

(A) if the appropriate regulatory agency for such member, participant, or person associated with a member finds that such member, participant, or person associated with a member has engaged in such acts or practices, or has omitted such acts, as the self-regulatory organization has found him to have engaged in or omitted, that such acts or practices, or omissions to act, are in violation of such provisions of this chapter, the rules or regulations thereunder, the rules of the self-regulatory organization, or, in the case of a registered securities association, the rules of the Municipal Securities Rulemaking Board as have been specified in the determination of the self-regulatory organization, and that such provisions are, and were applied in a manner, consistent with the purposes of this chapter, such appropriate regulatory agency, by order, shall so declare and, as appropriate, affirm the sanction imposed by the self-regulatory organization, modify the sanction in accordance with paragraph (2) of this subsection, or remand to the self-regulatory organization for further proceedings; or

(B) if such appropriate regulatory agency does not make any such finding it shall, by order, set aside the

sanction imposed by the self-regulatory organization and, if appropriate, remand to the self-regulatory organization for further proceedings.

(2) If the appropriate regulatory agency for a member, participant, or person associated with a member, having due regard for the public interest and the protection of investors, finds after a proceeding in accordance with paragraph (1) of this subsection that a sanction imposed by a self-regulatory organization upon such member, participant, or person associated with a member imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter or is excessive or oppressive, the appropriate regulatory agency may cancel, reduce, or require the remission of such sanction.

Dismissal of review proceeding

(f) If any proceeding to review the denial of membership or participation in a self-regulatory organization to any applicant, the barring of any person from becoming associated with a member of a self-regulatory organization, or the prohibition or limitation by a self-regulatory organization of any person with respect to access to services offered by the self-regulatory organization or any member thereof, if the appropriate regulatory agency for such applicant or person, after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to dismiss the proceeding or set aside the action of the self-regulatory organization) finds that the specific grounds on which such denial, bar, or prohibition or limitation is based exist in fact, that such denial, bar, or prohibition or limitation is in accordance with the rules of the self-regulatory organzation, and that such rules are, and were

applied in a manner, consistent with the purposes of this chapter, such appropriate regulatory agency, by order, shall dismiss the proceeding. If such appropriate regulatory agency does not make any such finding or if it finds that such denial, bar, or prohibition or limitation imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter, such appropriate regulatory agency, by order, shall set aside the action of the self-regulatory organization and require it to admit such applicant to membership or participation, permit such person to become associated with a member, or grant such person access to services offered by the self-regulatory organization or member thereof.

* * *

15 U.S.C. §78y (SECTION 25 OF THE SECURITIES EXCHANGE ACT OF 1934) (PORTIONS FROM VOLUME OF U.S.C.A., TABLE 15, §§78n TO 140, 1979 POCKET PART, PP. 174-176):

§78y. Court review of orders and rules—Final Commission orders; persons aggrieved; petition; record; findings; affirmance, modification, enforcement, or setting aside of orders; remand to adduce additional evidence

(a)(1) A person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.

(2) A copy of the petition shall be transmitted forthwith by the clerk of the court to a member of the Com-

mission or an officer designated by the Commission for that purpose. Thereupon the Commission shall file in the court the record on which the order complained of is entered, as provided in section 2112 of Title 28 and the Federal Rules of Appellate Procedure.

(3) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part.

(4) The findings of the Commission as to the facts, if supported by substantial evidence, are conclusive.

(5) If either party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there was reasonable ground for failure to adduce it before the Commission, the court may remand the case to the Commission for further proceedings, in whatever manner and on whatever conditions the court considers appropriate. If the case is remanded to the Commission, it shall file in the court a supplemental record containing any new evidence, any further or modified findings, and any new order.

* * *

Objections not urged before Commission; stay of orders and rules; transfer of enforcement or review proceedings

(c)(1) No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so.

(2) The filing of a petition under this section does not operate as a stay of the Commission's order or rule. Until the court's jurisdiction becomes exclusive, the Commission may stay its order or rule pending judicial review if it finds that justice so requires. After the filing of a petition under this section, the court, on whatever conditions may be required and to the extent necessary to prevent irreparable injury, may issue all necessary and appropriate process to stay the order or rule or to preserve status or rights pending its review; but (notwithstanding section 705 of Title 5) no such process may be issued by the court before the filing of the record or the materials set forth in subsection (b)(2) of this section unless: (A) the Commission has denied a stay or failed to grant requested relief, (B) a reasonable period has expired since the filing of an application for a stay without a decision by the Commission, or (C) there was reasonable ground for failure to apply to the Commission.

(3) When the same order or rule is the subject of one or more petitions for review filed under this section and an action for enforcement filed in a district court of the United States under section 78u(d) or (e) of this title, that court in which the petition or the action is first filed has jurisdiction with respect to the order or rule to the exclusion of any other court, and thereupon all such proceedings shall be transferred to that court; but, for the convenience of the parties in the interest of justice, that court may thereafter transfer all the proceedings to any other court of appeals or district court of the United States, whether or not a petition for review or an action for enforcement was originally filed in the transferee court. The scope of review by a district court under section 78u(d) or (e) of this title is in all cases the same as by a court of appeals under this section.

* * *"

15 U.S.C. §78aa (SECTION 27 OF THE SECURITIES EXCHANGE ACT OF 1934) (FROM VOLUME OF U.S.C.A., TITLE 15, §§78n TO 140, P. 242):

"*§ 78aa. Jurisdiction of offenses and suits*

The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts."

Former 15 U.S.C. § 78o-3 (portions from volume of U.S.C.A., Title 15, §§78n to 140, pp. 80-82):

"* * *

Review by Commission of adverse action against association members; stay of action

(g) If any registered securities association (whether national or affiliated) takes any disciplinary action against

any member thereof or any person associated with such a member or denies admission to any broker or dealer seeking membership therein, or bars any person from being associated with a member, such action shall be subject to review by the Commission, on its own motion, or upon application by any person aggrieved thereby filed within thirty days after such action has been taken or within such longer period as the Commission may determine. Application to the Commission for review, or the institution of review by the Commission on its own motion, shall operate as a stay of such action until an order is issued upon such review pursuant to subsection (h) of this section, unless the Commission otherwise orders, after notice and opportunity for hearing on the question of a stay (which hearing may consist solely of affidavits and oral arguments).

Commission's action upon findings

(h) (1) In a proceeding to review disciplinary action taken by a registered securities association against a member thereof or a person associated with a member, if the Commission, after appropriate notice and opportunity for hearing, upon consideration of the record before the association and such other evidence as it may deem relevant—

(A) finds that such member or person has engaged in such acts or practices, or has omitted such act, as the association has found him to have engaged in or omitted, and

(B) determines that such acts or practices, or omission to act, are in violation of such rules of the association as have been designated in the determination of the association,

the Commission shall by order dismiss the proceeding, unless it appears to the Commission that such action should

be modified in accordance with paragraph (2) of this subsection. The Commission shall likewise determine whether the acts or practices prohibited, or the omission of any act required, by any such rule constitute conduct inconsistent with just and equitable principles of trade, and shall so declare. If it appears to the Commission that the evidence does not warrant the finding required in clause (A), or if the Commission determines that such acts or practices as are found to have been engaged in are not prohibited by the designated rule or rules of the association, or that such act as is found to have been omitted is not required by such designated rule or rules, the Commission shall by order set aside the action of the association.

(2) If, after appropriate notice and opportunity for hearing, the Commission finds that any penalty imposed upon a member or person associated with a member is excessive or oppressive, having due regard to the public interest, the Commission shall be order cancel, reduce, or require the remission of such penalty.

(3) In any proceeding to review the denial of membership in a registered securities association or the barring of any person from being associated with a member, if the Commission, after appropriate notice and hearing, and upon consideration of the record before the association and such other evidence as it may deem relevant, determines that the specific grounds on which such denial or bar is based exist in fact and are valid under this section, the Commission shall by order dismiss the proceeding; otherwise, the Commission shall by order set aside the action of the association and require it to admit the applicant broker or dealer to membership therein, or to permit such person to be associated with a member.

* * *"

Supreme Court, U. S.
FILED
DEC 19 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-829

FIRST JERSEY SECURITIES, INC., a corporation of the State of New Jersey; ROBERT E. BRENNAN; JOSEPH GALLIGAN; JACK MONDEL; CHARLES OEHLERT; JOHN DELL; MICHAEL ZUDONYI; and ANTHONY NADINO,

Petitioners,

v.

HONORABLE VINCENT P. BIUNNO, Judge, United States District Court, Nominal Respondent,

(GEORGE J. BERGEN, individually and in his official capacity; and NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., a corporation of the State of Delaware, Real Parties in Interest),

Respondents.

On Petition for Writ of Certiorari to the Unted States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENTS GEORGE J. BERGEN AND NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. IN OPPOSITION

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December, 1979

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

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In the

Supreme Court of the United States

October Term, 1979

No. 79-829

FIRST JERSEY SECURITIES, INC., a corporation of the State of New Jersey; ROBERT E. BRENNAN; JOSEPH GALLIGAN; JACK MONDEL; CHARLES OEHLERT; JOHN DELL; MICHAEL ZUDONYI; and ANTHONY NADINO,

Petitioners,

v.

HONORABLE VINCENT P. BIUNNO, Judge, United States District Court, Nominal Respondent,

(GEORGE J. BERGEN, individually and in his official capacity; and NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., a corporation of the State of Delaware, Real Parties in Interest),

Respondents.

On Petition for Writ of Certiorari to the Unted States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENTS GEORGE J. BERGEN AND NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. IN OPPOSITION

Respondents/Real Parties-in-Interest George J. Bergen and National Association of Securities Dealers, Inc. respectfully pray that the Petition for Writ of Certiorari be denied.

Opinion Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at 605 F.2d 690 and appears within Petitioners' Appendix E, p. 36a *et seq.* The opinion of the United States District Court for the District of New Jersey, not yet reported, appears at Petitioners' Appendix C, p. 5a *et seq.*

Questions Presented

1. Whether the Writ of Mandamus issued by the United States Court of Appeals for the Third Circuit was appropriate to correct the district court's clear and substantial intrusion into the conduct of a pending NASD proceeding.

2. Did the district court herein exceed its authority by conditionally denying injunctive relief against Respondents upon eight "assumptions" of Respondents' future conduct and by simultaneously retaining jurisdiction to monitor Respondents' conduct and afford a forum for Petitioners if the "assumptions" were not met.

3. Did the district court herein abuse its discretion by failing to dismiss the action in deference to the administrative and judicial review processes established by Congress?

Statement of the Case

Respondents submit a Statement of the Case because of misstatements and serious omissions in the Petition for a Writ of Certiorari. Specifically, the Petition repeatedly asserts as "facts" the allegations made by Petitioners in the district court. These assertions plus the further characterization of many claims as "uncontroverted" simply ignore the numerous and substantial opposing affidavits filed in the district court and incorporated into its record.

Respondent National Association of Securities Dealers, Inc. ("NASD") is a national securities association registered with the Securities Exchange Commission ("SEC") under the Maloney Act, 15 U.S.C. §78o-3, which amended the Securities Exchange Act of 1934, 15 U.S.C. §§78a *et seq.* NASD's purpose is to provide for self-regulation of the over-the-counter securities markets. It is charged by federal statute to promulgate standards of conduct for its members and to discipline those of its members who fail to conform to the standards which have been prescribed.

Respondent George J. Bergen ("Bergen") is a vice president of NASD and is the Director of NASD District 12, which governs New York City and the surrounding area.

Petitioner First Jersey Securities, Inc. ("First Jersey") is a broker and dealer in securities registered with the SEC and is a member of the NASD. The other petitioners are all officers or employees of First Jersey and, as such, are required to be and are registered with the NASD.

In November of 1977, NASD staff examiners inspecting the books and records of First Jersey found unusual patterns of sporadic, high volume trading in a few low priced over-the-counter stocks. The examiners prepared schedules of market transactions which revealed patterns of market domination and price manipulation used to perpetrate a massive fraud on First Jersey's public customers. The schedules showed that different branch offices

of First Jersey would simultaneously engage in conflicting customer transactions in the same stocks and in extraordinary high volume. Customers in one branch office, for example, would sell stock at $3.00 per share to First Jersey's trading account while, simultaneously, customers of another branch office, sufficiently distant from the first, were sold the same stock at $4.00 per share. The shares sold by customers of the first branch office became the shares purchased by customers of the second branch office.

Subsequent inquiry by NASD staff of some former First Jersey salesmen confirmed that the short bursts of trading activity were limited to selected branch offices and were *not* the coincidental result of independent and honest investment decisions by sales representatives or their public customers. Instead, the transactions were the result of premeditated, coordinated short-term campaigns. On numerous occasions, First Jersey personnel simultaneously solicited massive sales by one branch office's customers of a security and massive purchases of the same security by customers of another branch. The "crossing" of such trading within First Jersey resulted in hundreds of thousands of dollars of profits and raises questions of violations of fiduciary obligations owed by brokers to their customers as well as other established rules and ethical concepts which govern the securities industry.

There is no question but that the facts discovered by the NASD staff constituted the administrative equivalent of "probable cause" for NASD to commence a disciplinary proceeding. It is also significant that on May 17, 1979, during the pendency of the proceedings in the district court, the SEC commenced a separate enforcement action on the basis of some of the same facts discovered by NASD against First Jersey, Robert Brennan and some

of the other Petitioners herein alleging violations of the federal securities laws and SEC rules. (The NASD's complaint charged Petitioners with violations of NASD Rules of Fair Practice.)

On February 1, 1979 pursuant to the authority and responsibility vested by Congress in the NASD, the District Business Conduct Committee of NASD District 12 commenced a disciplinary proceeding against Petitioners to determine if they had engaged in prohibited conduct. The Petitioners (sometimes collectively referred to herein as "First Jersey") did not answer the NASD complaint but instead commenced this action on April 17, 1979 seeking damages and to permanently enjoin the NASD from deciding the issues raised in its disciplinary proceeding. The jurisdiction of the district court was claimed under 15 U.S.C. §78aa and 28 U.S.C. §1331.

Petitioners alleged that the NASD and Bergen were violating their federal and state Constitutional rights to due process, as well as rights to a fair procedure under the Maloney Act and under the Administrative Procedure Act, 5 U.S.C. §554. Petitioners made numerous allegations concerning the manner and means by which the NASD District 12 investigation was conducted and the procedure by which the administrative complaint was instituted and was to be considered.

It is Respondents' contention that Petitioners' Complaint is a sham and that suit was instituted solely to vex and to delay NASD's disciplinary proceedings against Petitioners.

On April 17, 1979, the same day the civil action was commenced by Petitioners herein, they sought and were

granted, on an *ex parte* basis, an order by the district court for early depositions of Respondents to commence the day after service of process. Subsequent orders of the district court on April 20 and 26 required NASD to deliver all its documents to the accounting firm of Peat, Marwick, Mitchell & Co. as "Custodian" on April 27 and to commence depositions May 1st. Pursuant to urging of the district judge, Respondents engaged independent counsel over the weekend of April 28-29.

Respondents moved on April 30 to stay or modify the extant discovery orders to provide time for counsel to become familiar with the case and to file motions to dismiss. The application was denied. On May 3 defendants moved for a stay of the district court's April 17 and April 30 orders pending an appeal. This application was denied on May 4.

The district court's orders for discovery disrupted and frustrated NASD's prosecution of its action against Petitioners. For example, Petitioners conducted seven days of oral examination of the NASD Staff Attorney responsible, in part, for the preparation and presentation of evidence at the pending NASD hearing. The district court's discovery orders and its further orders denying a stay of them were the subject of NASD's Petition for Writ of Mandamus on May 16, 1979 to the United States Court of Appeals for the Third Circuit (hereinafter "Court of Appeals"), which issued an order staying all discovery in the district court proceedings on May 21, 1979, pending consideration of the Mandamus application.

In the course of the proceedings in the district court, Petitioners were urged by NASD on numerous occasions to follow established NASD procedures (which the Court

of Appeals found were "replete with procedural safeguards" (p. 43a)) to challenge the purported "bias" of District 12 committee members. Petitioners refused to do so. Nevertheless, to nullify and render moot all of Petitioners' assertions of bias and prejudice, NASD *unilaterally* changed the panel of Petitioners' disciplinary hearing to one composed of members from NASD District 8 in Chicago.

Respondents duly moved before the district court for a dismissal of the Complaint. Petitioners thereafter filed an order to show cause seeking a preliminary injunction of the NASD hearing. The district court consolidated both applications and heard testimony in open court for three days commencing on May 30, 1979. Respondents submitted no testimony at the hearing, but the numerous affidavits filed by Respondents in the district court were incorporated into the record. On June 4, 1979, the district court entered an order denying both the motion to dismiss and the application for a preliminary injunction. A copy of the district court's bench opinion is in Petitioners Appendix at p. 5a. After weeks of Petitioners' inspection of Respondents' investigative files, seven days of oral examination of its staff attorney and three days of testimony in open court, Petitioners failed to establish their case for a preliminary injunction. Nevertheless, the district court refused to dismiss the Complaint so as to permit the NASD to fulfill its Congressional mandate by expeditiously prosecuting its action against Respondents.

The district court's decision sets forth eight "assumptions" as the basis for its denial of Petitioners' application for injunctive relief. Jurisdiction was retained by the district court to monitor compliance with its "assumptions." The denial of the injunction was ". . . without prejudice to any further application as may be justified

in the event that the stated and implied assumptions may be frustrated." (slip opinion, p. 29a). Compliance with the district court's views was clearly expected. With respect to Respondents' motion to dismiss, the court stated that a stay or dismissal might be appropriate at some point "[i]f the court's assumptions prove to be correct . . ." (p. 29a).

The "assumptions", never previously suggested to the district court by NASD, touched upon critical issues such as selection of staff members to handle prosecution of NASD's disciplinary proceeding (assumption number one) and the time at which NASD would undertake processing of its disciplinary proceeding (assumption number five). The court "assumed", for example, that NASD proceedings would not commence until after the SEC had completed its hearings notwithstanding the fact that no SEC hearings had been scheduled and the date of their completion was wholly unknown.

The eight assumptions coupled with the stated purpose of the retained jurisdiction constituted a clear invitation to Petitioners to return to the district court if the assumptions were not borne out during the NASD disciplinary proceedings. The problem facing NASD could not have been more real. In order to properly fulfill the obligations of its Congressional charter, the NASD faced the prospect of defying the expressed views of the district court. But the unusual ruling by the district court precluded any direct appeal to the Court of Appeals. The NASD, in good faith, then advised the district court by letter of June 12, 1979 of its position that some of the assumptions were inaccurate. Respondent NASD had virtually no chance of completing its proceedings in a expeditious, efficient manner as is required to protect the public interest.

On June 7, 1979, NASD applied to the district court for an order amending the denial of Petitioners' motion to dismiss to include a certification pursuant to 28 U.S.C. §1292(b). This application was denied on June 12, 1979. Respondents then filed a second Petition for Writ of Mandamus to the Court of Appeals based upon the district court's ruling and its effect. Both Petitions were consolidated, substantial briefs on the Petitions were filed and oral argument was heard by the Court of Appeals, which on August 29, 1979 granted one of NASD's Petitions and ordered the district court to dismiss the case for lack of jurisdiction (Judgment, p. 61a; Writ of Mandamus, p. 63a).

The Court of Appeals' ruling was based on (1) the district court's failure to follow the doctrine of exhaustion of administrative remedies *and* (2) the district court's unwarranted intrusion into the agency proceeding itself.

REASONS FOR DENYING THE WRIT

I.

The Writ of Mandamus was properly issued by the Court of Appeals to correct a usurpation of power by the District Court.

Petitioners contend that the Writ of Mandamus issued because the district court failed to dismiss the action upon Respondents' motion. By contending that the district court had discretion to apply or reject the doctrine of exhaustion of administrative remedies, Petitioners create a false conflict with this Court's instruction in *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655 (1978). In so doing, Petitioners both err and mislead this Court.

The Court of Appeals decision carefuly enunciated a *two-step* analysis in determining whether a Writ of Mandamus should issue. It is only the first part of that analysis, the discussion of the role of exhaustion of administrative remedies, that Petitioners cite. They ignore the second and equally determinative portion of the Court of Appeals opinion (commencing at p. 55a) which addressed whether, having determined error by the district court, the *attendant circumstances and actions* by the district court warranted mandamus. The Court of Appeals, with good reason, found that the district court's action exceeded its authority. As the Court of Appeals stated:

> "We believe, however, that the strict requirements for mandamus have been met in this case. NASD, in an effort to carry out its designated duty of enforcing the regulations of over-the-counter securities dealers, instituted a disciplinary proceeding against First Jersey. First Jersey attempted to block this effort by filing suit in district court. Because of the Company's failure to exhaust administrative remedies, the district court was without jurisdiction and should have dismissed the suit. Instead the court allowed discovery to proceed, which burdened NASD sufficiently to effectively halt the action against First Jersey. The court, although denying First Jersey's request for preliminary relief, did so on the basis of certain assumptions. It retained jurisdiction over the suit and *invited the company to return to court in the event any of the assumptions proved to be unfounded,* which NASD states is the case as to some of the assumptions. *This has the forceful effect of an injunction but precludes appellate review.* Thus, NASD lacks an alternative means of obtaining adequate relief. The district court's exercise of jurisdiction where none exists *and forecloseing appellate review* results in substantial interference with a congressionally mandated administrative process and amounts to a judicial usurpation of power.
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> * * *
>
> . . . We hold that when the district court impermissibly *interferes with the legitimate operation of a federal administrative agency,* the agency is entitled to the issuance of a writ of mandamus to halt the judicial usurpation of power."

Slip Op., pp. 56a-57a (Emphasis added).

It is one thing to allow, for sound reasons of policy, a jurisdictional question to abide the normal events leading to appellate review. It is quite different, and substantially adverse to those same policy considerations, to permit improper jurisdiction to result in a forum in the district court from which a respondent in an agency proceeding can "broadside" the agency and its personnel to the inevitable frustration of the agency's Congressional charter and mandate.

II.

The District Court had no discretion to retain jurisdiction under controlling decisions.

The Court of Appeals correctly rejected the Petitioners' contention that once *any* discretion by the district court is involved, mandamus under *Calvert* is simply not available under any circumstances. This Court's decision in *Calvert* was premised upon the inherent discretion of a district court in the control of its calendar, which discretion was held to have precluded an applicants' "clear and indisput-

able" right to a Writ of Mandamus. 437 U.S. 665-666. The Court of Appeals herein noted the great difference in the *degree* of discretion applicable between calendar control by the district court and a decision not to follow the well-estabilshed doctrine of requiring a party to exhaust his administrative remedies. The Court of Appeals stated the recognized rule that the doctrine *is to be followed* (Slip Op. pp. 43a-46a) except in two special situations not applicable to Petitioners.[1]

NASD's Code of Procedure, which governs the conduct of disciplinary proceedings, sets forth specific procedures facilitating appellate review. The District Business Conduct Committees initially hear and pass upon all complaints. A written decision must be issued by the District Committee setting forth, *inter alia,* the act or practice in which the respondent has engaged, the specific rules violated, and the penalty imposed. Respondents are afforded a second level of consideration through a *de novo* hearing before a subcommittee of the NASD's Board of Governors and another level of review by the whole Board of Governors. In addition, respondent is informed that it has the right to appeal a final determination of the NASD to the SEC. Thus, procedural requirements for NASD disciplinary proceedings provide for two levels of hearings and a review at the NASD level, even before *de novo* review by the SEC.

15 U.S.C. §78o-3 sets forth a well reasoned and carefully considered scheme of securities industry *self*-regulation under the supervision of the SEC. The rules of NASD are subject to SEC review and approval before

[1] The appellate court decision noted this Court's decisions in *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 50-51 (1938) and *McKart* v. *United States,* 395 U.S. 185, 193 (1969).

they become effective and in the later course of their application in specific proceedings. Review of NASD proceedings by the SEC is set by statute, 15 U.S.C. §78 s(d)(2) as is the subsequent *judicial* review of any SEC determination by the Court of Appeals. 15 U.S.C. §78y(a)(1).

Petitioners contend that 15 U.S.C. §78aa vests a district court with *exclusive* jurisdiction for purported Exchange Act violations *including Petitioners' claims* against the NASD. This erroneous view would have the jurisdictional provisions of 15 U.S.C. §78aa (which, as the Court of Appeals noted, provide for district court jurisdiction for substantive violations of the act in suits by the SEC or private parties) used to entertain allegations of procedural irregularities of any type in derogation of the statutory scheme of administrative overview and Court of Appeals jurisdiction to correct infirmities where they exist. The consequence of Petitioners' assertion would enable *any* respondent in *any* administrative proceeding to delay and frustrate the proceeding by commencing suit in a district court alleging procedural irregularity.

In this regard, it is significant that the Securities Act Amendments of 1975 made substantial additions to 15 U.S.C. §78y, expressly placing judicial review of SEC *rules* in the Courts of Appeals under the Exchange Act, rather than with the district courts under the Administrative Procedure Act, 5 U.S.C. §702. As noted in the Report of the Senate Committee accompanying the 1975 Amendments to the 1934 Act:

> "Industry organizations, *i.e.,* the exchanges and the NASD are delegated governmental power in order to enforce, at their own initiative, compliance by members of the industry with both the legal requirements laid down in the Exchange Act and ethical standards going beyond those requirements.

> *The SEC is charged with supervising the exercise of this self-regulatory power in order to assure that it is used effectively to fulfill the responsibilities assigned to the self-regulatory agencies, and that it is not used in a manner inimical to the public interest or unfair to private interests".* S. Rep. No. 94-75, 94th Cong., 1st Sess. 22-23 (1975) [emphasis added].

In further noting that the self-regulatory organizations exercise authority subject to SEC oversight, the Report states:

> "The self-regulatory roles of the exchanges and the NASD have been major elements of the regulatory scheme of the Exchange Act since 1934 and 1938, respectively. Although self-regulation has not always performed up to expectations, on the whole it has worked well and the Committee believes it should be preserved and strengthened. S. 249 is designed to accomplish this, not only by clarifying regulatory responsibilities at all levels but also by *assuring that the self-regulatory organizations follow effective and fair procedures*, that their activities are not anti-competitive and that the Commission's oversight powers are ample *and its responsibility to correct self-regulatory lapses is unmistakable*. The intent of this bill is not to diminish the role of self-regulation but to strengthen the total regulatory fabric." *Id.* at 23. [emphasis added].

The Senate Committee Report, in considering the necessity for self-regulatory procedures to adhere to due process, and the Commission's duty to insure that these procedures operate in a manner consistent with due process requirements, noted:

> "Recognizing that the self-regulatory organizations utilize governmental-type powers in carrying out their responsibilities under the Exchange Act highlights the fact that these organizations must be required to conform their activities to fundamental standards of due process.
>
> The Exchange Act presently requires that the NSAD's disciplinary actions be conducted in accordance with rules which provide "a fair and orderly procedure," including the obligation that the self-regulatory organization bring "specific charges," give notice, provide an opportunity for hearing, and identify in any adverse determination the act or practice which constitutes the violation of a "specific rule or rules." The Exchange Act also provides for Commission review of NASD disciplinary actions both on the Commission's own motion and by petition of an aggrieved person." Id. at 25.

The two separate jurisdictional provisions of the Exchange Act, 15 U.S.C. §§78y(a)(1) and 78aa, provide additional *statutory* support for either the *intended* application of the doctrine of exhaustion or a determination that the carefully spelled out regulatory and procedural scheme of the Exchange Act mandates the regulatory forum and removes any question of exhaustion from the district court's consideration.

III.

All other issues cited by petitioners are premature and may be addressed in the administrative forum and in the course of proper judicial review thereafter as required by statute.

A. Purported constitutional infirmities, inherent and specific cannot be decided in the abstract.

In their further efforts to block not only the instant NASD proceeding, but *any* such proceeding, Petitioners have raised the gamut of inherent and specific claims challenging the Constitutionality of the key aspects of the self-regulatory framework set by Congress in 1934, 1938 and most recently in 1975, when the concept was reviewed, re-approved and strengthened. (See Senate Committee on Banking, Housing and Urban Affairs Report No. 94-75, April 14, 1975, portions of which are quoted within II herein). Petitioners seek to make this challenge not only before any steps in the regulatory scheme have been taken, but also after refusing to avail themselves of the procedural safeguards afforded to them by the NASD. Petitioners' refusal even to seek a venue change from District 12 to District 8 (thereby *creating* an issue) needs no amplification. In addition, Section XXIII of the NASD Code of Procedure provides for the removal from hearing panels of any member who has a conflict. Petitioners did not attempt to utilize this provision.

Their novel contenion that industry membership is inherently incapable of self-discipline compatible with Constitutional guarantees would effectively abolish the self-regulatory scheme notwithstanding forty years of successful operation. Until Petitioners experience an adverse decision *in the course of such a proceeding*, they are

arguing only in the abstract. The administrative process herein has had no opportunity *at Petitioners' instance* to perceive, address, decide and, if necessary, correct any of the procedural shortcomings alleged.

The question presently before this Court is the propriety of *certiorari* to review the Court of Appeals' issuance of a Writ of Mandamus to the district court. That decision need not—and by common sense should not—be enlarged to consider abstract questions which no lower court or regulatory agency has considered.

The Court of Appeals' discussion of Petitioners' constitutional claims (pp. 48a-55a) was clearly not intended to be dispositive of such claims as they might *ultimately* be articulated by Petitioners if and when *future* facts, events and rulings occur. Rather, the Court of Appeals' discussion was in the context of Petitioners' failure to demonstrate *clear and unambiguous* Constitutional violation by the agency. In the case of *Todd & Co. v. SEC*, 557 F.2d 1008 (3d Cir. 1977) at page 1012 the Court of Appeals decided the question of unconstitutional delegation. As to the 1975 Amendment purportedly affecting the scope of SEC review, the Court of Appeals in the case below said:

> "We need not now decide whether this statutory change effects a significant alteration in the SEC's power to review NASD disciplinary proceedings. It suffices to say that to the extent the amendment restricts the SEC's ability to receive additional evidence not presented below, this does not alter our conclusion in Todd that there is no unconstitutional delegation of legislative authority". p. 49a (emphasis added).

Just as the limited consideration of Respondents' Petition for Writ of Mandamus before the Court of Appeals was deemed not the time to explore a purported Constitutional claim in depth, the within consideration of *certiorari* is not the appropriate time to address abstract issues and theoretical niceties. Likewise with respect to structural or specific bias, the Court of Appeals' opinion did not attempt to forestall all consideration of Petitioners' claims. The Court of Appeals properly determined only that it was neither the time nor the place to do so in the district court during the pendency of the agency proceeding.

Petitioners' invitation, to dismantle the foundation of the Exchange Act upon no record and no prior ruling (administrative or judicial) on the within facts, should be declined.

B. Exhaustion of administrative remedies, State v. Federal considerations.

Petitioners assert that different standards presently control the doctrine of exhaustion of administrative remedies as applied to federal or state regulatory agencies. The genesis of this assertion is the Court of Appeals' careful distinction, in the decision below, of *Gibson* v. *Berryhill*, 411 U.S. 564 (1973), which concerned a state regulatory agency, and the instant case which concerns a federal regulatory scheme. As the Court of Appeals properly noted, *Gibson* was an action under 42 U.S.C. §1983 and this Court held that the "state administrative remedies need not be exhausted where the federal court plaintiff states an otherwise good cause of action under 42 U.S.C. §1983." (p. 52a). Petitioners misinterpret a ruling on the application of §1983 as a decision on the standards for application of the doctrine of exhaustion. While there

may be instances where §1983 *precludes* application of the doctrine, it does not vary the standards of application. What Petitioners really seek is a ruling from this Court on the scope and effect of §1983 in the instant case wherein no §1983 claim is made. Petitioners invitation for such a ruling should be denied.

CONCLUSION

For these reasons, a writ of certiorari to review the judgment and opinion of the Court of Appeals should be denied.

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